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# REPORT OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q. C.,  
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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VOL. XXIV.

CONTAINING THE CASES DETERMINED  
FROM TRINITY TERM 28 VICTORIA, TO TRINITY TERM 29 VICTORIA:  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

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TORONTO:  
HENRY ROWSELL,  
1866.

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# REPORT OF CASES

ASSEMBLED BY THE

## COURT OF QUEEN'S BENCH

CHRISTOPHER ROBINSON, Q. C.

THE JUDGE AT LAW AND REPORTER TO THE COURT

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HENRY ROWSELL, LAW PRINTER, KING STREET, TORONTO.

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VOL. XLIV

CONTAINING THE CASES REPORTED  
FROM THE 1ST TERM TO THE 4TH TERM OF 1862.  
WITH A TABLE OF THE NAMES OF CASES.  
AND INDEX BY THE EDITOR.

TORONTO:  
HENRY ROWSELL.

1862.



# JUDGES

OF THE

## COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM HENRY DRAPER, C. B., Chief Justice.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

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*Attorney-General :*

THE HONORABLE JOHN ALEXANDER MACDONALD.

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*Solicitor-General :*

THE HONORABLE JAMES COCKBURN.





# A TABLE

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

B.	C.
Ball v. Sprung..... 422	Campbell v. Delihanty et al..... 236
Bank of Montreal v. Reynolds et al... 381	Canada Life Assurance Company,
Bank of Montreal v. Scott..... 115	Dowker et al. v. .... 591
Bank of Upper Canada, Vidal v..... 430	Canadian Land and Emigration Com-
Banting v. Gummerson ..... 287	pany, Gossage v. .... 452
Barnard, Moffat v. .... 498	Cassels, Keating v..... 314
Barton v. the Corporation of Dun-	Chairman of the Quarter Sessions of
das et al. .... 273	Waterloo, Davidson and the ..... 66
Bates v. the Great Western Railway	Clark v. Galbraith et al. .... 25
Company ..... 544	Clark v. Stevenson ..... 200
Bennett v. Covert ..... 38	Coe and the Corporation of the Town-
Berry, Hogan v. .... 346	ship of Pickering ..... 439
Berryman v. the President, Directors	Coffin v. Danard et al. .... 267
and Company of Port Burwell	Commercial Bank of Canada, Lett v.. 552
Harbour .... 34	Corcoran, Craig et al. v..... 406
Bletcher v. Burn..... 124, 259	Corporation of Dundas et al., Barton v. 273
Bletcher v. Marsh et al..... 266	Corporation of Guelph, Fennell and... 238
Boon and the Corporation of the	Corporation of the County of Halton,
County of Halton, <i>In re</i> ..... 361	Boon and ..... 361
Briggs v. the Grand Trunk Railway	Corporation of the County of Lincoln,
Company ..... 510	Paffard and ..... 16
Brown, Riddell v. .... 90	Corporation of the County of Lincoln,
Brown et al v. the Grand Trunk	Secord and ..... 142
Railway Company ..... 350	Corporation of Longueuil v. Cushman 602
Brunton, Kerr et al. v. .... 390	Corporation of the Township of Pick-
Buffalo and Lake Huron Railway	ering, Coe and..... 439
Company, McLean et al. v. .... 270	Corporation of Ross, Forester and ... 588
Buffalo and Lake Huron Railway	Covert, Bennett v. .... 38
Company, Widder v..... 222, 520	Covert v. Robinson..... 282
Burns v. McAdam ..... 449	Cowan, Regina v. .... 606
Burn, Bletcher v. .... 124, 259	Cox v. Jones ..... 81

Crabb, Dickson v. ....	494	Gossage v. the Canadian Land and Emigration Company.....	452
Craig et al. v. Corcoran.....	406	Gould, Hamilton v. ....	58
Craig v. the Great Western Railway Company .....	504	Grand Trunk Railway Company, Briggs v. ....	510
Cushman v. the Corporation of Lon- gueuil .....	602	Grand Trunk Railway Company, Brown et al. v. ....	350
D.		Grand Trunk Railway Company, the Great Western Railway Com- pany v.....	107
Danard et al., Coffin v. ....	267	Grand Trunk Railway Company, Gwynne v. ....	482
D'Arcy v. White et al. ....	570	Great Western Railway Company v. the Grand Trunk Railway Company .....	107
Davidson and the Chairman of the Quarter Sessions of Waterloo ...	66	Great Western Railway Company, Thomas v. ....	326
Davies v. the Home Insurance Com- pany .....	364	Great Western Railway Company, Gamble v.....	407
Delihanty et al., Campbell v. ....	236	Great Western Railway Company, Craig v. ....	504
Dennis, Leach v. ....	129	Great Western Railway Company, Bates v. ....	544
Dennison v. Knox ....	119	Green et ux. v. Wright .....	245
Dickson v. Crabb .....	494	Guelph, the Corporation of, Fennell and .....	238
Dougall v. Wilson .....	433	Gummerson, Banting v. ....	287
Dowker et al. v. Canada Life Assu- rance Company .....	591	Gwynne v. The Grank Trunk Railway Company .....	482
Dowswell, Herbert <i>qui tam</i> , v. ....	427		
Dundas, the Corporation of, Barton v.	273		
Dundas v. Johnston et al. ....	547		
E.			
Edgar v. Newell .....	215		
Elmore v. Hind .....	136		
F.			
Fairman v. White .....	123		
Farley, Regina v. ....	384		
Fell v. South .....	196		
Fennell and the Corporation of Guelph	238		
Foley, Little v. ....	177		
Forester and the Corporation of Ross	588		
Freeland, Leith v. ....	132		
Furby, McKinstry v. ....	176		
G.			
Galbraith et al., Clark v. ....	25		
Gamble v. the Great Western Rail- way Company .....	407		
Gaynor et al. v. Salt .....	180		
Goodeve et al. v. Wallace et al.....	31		
Gordon et al., Robinson v. ....	285		
		H.	
		Hall, Sheriff, Hazlitt v. ....	484
		Hall, Sheriff, Kingan et al. v. ....	248
		Halton, the Corporation of the County of, Boon and .....	361
		Ham et ux. v. Lasher et al. ....	357
		Hamilton v. Gould .....	58
		Hammond and McLay, <i>In re</i> .....	56
		Hazlitt v. Hall, Sheriff .....	484
		Heath, Pentland, v. ....	464
		Hector, Spence v. ....	277
		Herbert <i>qui tam</i> v. Dowswell .....	427
		Hibbert v. Scott .....	581
		Hind, Elmore v. ....	136
		Hogan v. Berry .....	346
		Home Insurance Company, Davies v.	364
		Hunt v. McArthur .....	254





## R.

Regina v. Cowan .....	606
Regina v. Farley .....	384
Regina v. Munro .....	44
Regina v. McLeod .....	458
Regina v. Smith .....	480
Regina v. The Toronto Street Rail- way Company .....	454
Reid v. Miller .....	610
Reynolds et al, Bank of Montreal v....	381
Reynolds et al., Michie et al v. ....	303
Riddell v. Brown. ....	90
Robinson, Covert v. ....	282
Robinson v. Gordon et al. ....	285
Robinson v Waddell, Sheriff, et al....	488
Robson v. Waddell .....	574
Rose et al., Taylor v. ....	446
Ryan, Macfarlane, administrator of C. Panton, v. ....	474
Ross, Forester and the Corporation of,	588

## S.

Salt, Gaynor et al. v.....	180
Sandwich Street Plank Road Com- pany, Thornton v. ....	335
Scott, Bank of Montreal v. ....	115
Scott, the Ottawa Union Building So- ciety v.....	341
Scott, Hibbert v.....	581
Secord and the Corporation of the County of Lincoln .....	142
Short v. Parmer et al.....	638
Skeahon v. Whelan .....	174
Smith, Regina v.....	480
Snarr v. Waddell .....	165
Somers v. Livingston et al. ....	64
South, Fell v. ....	196
Spence v. Hector .....	277
Sprung, Ball v. ....	422
Stevenson, Clark v. ....	200
Stewart v. Lowe .....	434
Sullivan v. King .....	161

## T.

Taylor v. Rose et al. ....	446
Thomas v. the Great Western Rail- way Company .....	326
Thornton v. Sandwich Street Plank Road Company .....	335
Todd, Paterson v. ....	296
Toronto Street Railway Company, Regina v. ....	454
Tucker et ux v. Phillips et al. ....	626
Tyhurst, McIntosh v. ....	443

## V.

Vidal v. the Bank of Upper Canada...	430
Vindin v. Wallis .....	9
Vogt, Wilson et al v. ....	635

## W.

Waddell, Sheriff, Robinson v. ....	488
Waddell et al., Robson v. ....	574
Waddell, Snarr v. ....	165
Wallace et al., Goodeve et al. v.....	31
Wallis, Vindin v. ....	9
Waterloo, Chairman of the Quarter Sessions of, Davidson and .....	66
Watson v. Northern Railway Company	98
Whelan, Skeahon v. ....	174
White et al., D'Arcy, v.....	570
White, Fairman v. ....	123
Widder v. Buffalo and Lake Huron Railway Company .....	222, 520
Wilson, Dougall v. ....	483
Wilson et al. v. Vogt .....	635
Wixon, Pickard v. ...	416
Workman et al., McDermott et al. v..	467
Wright, Green et ux v. ....	245

## Y.

Young v. O'Reilly .....	172
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REPORT OF CASES

IN THE

COURT OF QUEEN'S BENCH,

TRINITY TERM, 28 VICTORIA, 1864, (*Continued.*)

*Present:*

THE HON. WILLIAM HENRY DRAPER, C. B., C. J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

VINDIN V. WALLIS.

*Voluntary conveyance—Sheriff's sale—Title claimed under—Right of defendant to impeach conveyance and require proof of judgment.*

Interpleader, to try the right to certain shares in a schooner, seized under an execution at the suit of the defendant against W. S. Marsh, on the 2nd of April, 1863. The plaintiff's title arose thus:—

1. On the 27th of April, 1859, W. S. Marsh made a voluntary conveyance to his son. 2. On the 5th of March, 1860, the sheriff, under a *ven. ex.*, against W. S. Marsh, sold to Schuyler Marsh. 3. The son on the 24th of March, 1863, confirmed this title by a voluntary deed to Schuyler Marsh, who on the same day conveyed to the plaintiff.

Schuyler Marsh had in December, 1861, mortgaged to one T., who on the 28th of March, 1863, assigned to the plaintiff. All these conveyances were duly registered at the custom house.

The defendant objected that a judgment should have been shewn to support the *ven. ex.*, and he desired to prove fraud affecting the sheriff's sale, by shewing that W. S. Marsh supplied the money then paid; but it was not denied that the plaintiff was a *bonâ fide* purchaser for value without notice.

*Held*, that the defendant, who so far as appeared was not a creditor of W. S. Marsh until long after the deed to his son, and who was a stranger to the judgment on which the *ven. ex.* issued, was not in a position to impeach the plaintiff's title, or to require that such judgment should be proved.

INTERPLEADER, to try whether  $40\frac{2}{3}$  shares of the schooner *Caroline Marsh*, seized in execution on the 2nd of

April, 1863, on a writ of *fi. fa.*, tested the 11th of March, 1863, on a judgment recovered by the defendant against William Samuel Marsh, were at the time of the seizure the property of the plaintiff as against the defendant.

The issue was tried in October, 1863, at Cobourg, before *Morrison, J.*

It was admitted that all certificates signed by the collector of Port Hope were true, and that all registrations certified by him took place as stated in the certificates.

The plaintiff put in the following documents :

1. The original certificate of ownership, dated 11th May, 1852, shewing William S. Marsh and Donald Manson to be owners of the *Caroline Marsh*.

2. A registry declaration, dated 16th of May, 1852, stating the *Caroline Marsh* to be the property of William S. Marsh and D. Manson, and on which was endorsed that Marsh was owner of  $40\frac{2}{3}$  shares, and Manson owner of  $21\frac{1}{3}$  shares, and on the 11th of May, 1852, was endorsed that Manson had become master.

3. Certified extracts relating to the *Caroline Marsh*, from the book in the custom house, which contained entries of the registry of certificates of ownership granted, and of bills of sale, mortgages, and other instruments.

4. A deed poll, dated the 27th of April, 1859, whereby William S. Marsh, in consideration of natural love and affection, and of five shillings, bargained and sold to his son, William Marsh the younger,  $40\frac{2}{3}$  shares in the *Caroline Marsh*, (setting out the certificate of ownership at length.) *Habendum* to William Marsh the younger, his executors, administrators and assigns for ever. This deed was registered with the collector on the 28th of April, 1859.

5. A writ of *ven. ex.*, tested the 13th September, 1859, at the suit of the Bank of Montreal against William S. Marsh, Duncan McLeod, John Fraser and William Fraser, to levy £213 18s. 1d.

6. A bill of sale, dated 5th of March, 1860, whereby James B. Fortune, sheriff, by virtue of the said writ of *ven. ex.*, (after reciting the seizure of  $40\frac{2}{3}$  shares of the *Caroline Marsh*, and setting out the certificate of ownership) in con-



sideration of £200, bargained, sold and assigned the said  $40\frac{2}{3}$  shares to Schuyler S. Marsh. This deed was registered with the collector at Port Hope on the 26th of April, 1860.

7. An indenture, dated the 21st December, 1861, made between Schuyler S. Marsh and Moses Thompson—reciting that Marsh had agreed to secure Thompson from the payment of a promissory note endorsed by him, or of any notes to be thereafter endorsed by him for Marsh's accommodation—whereby Marsh bargained and sold all his shares ( $40\frac{2}{3}$  shares) in the *Caroline Marsh*, setting out the certificate of ownership, but on condition that the sale should be void if Thompson was indemnified. This mortgage was registered with the collector on the 23rd of December, 1861.

8. Deed poll, dated the 24th of March, 1863, whereby William Marsh, in consideration of natural love and affection, and of 5s., bargained and sold to Schuyler S. Marsh  $40\frac{2}{3}$  shares in the *Caroline Marsh*, setting out the certificate of registry. Registered with the collector on the 28th of March, 1863.

9. Deed poll, dated 24th of March, 1863, whereby Schuyler S. Marsh, in consideration of \$1,600, bargained and sold to the plaintiff  $40\frac{2}{3}$  shares in the *Caroline Marsh*, setting out the certificate of ownership. Registered with the collector on the 28th of March, 1863.

10. Indenture, dated the 28th of March, 1863, made between Moses Thompson and the plaintiff—reciting the mortgage deed of 21st December, 1861, and the certificate of ownership—by which, in consideration of 5s., Thompson assigned, transferred, and released to the plaintiff the mortgage, and the  $40\frac{2}{3}$  shares in the *Caroline Marsh*. Registered with the collector on the 28th of March, 1863.

The defendant's counsel tendered evidence to shew that the sale by the sheriff under the execution of the Bank of Montreal was a merely colorable sale as between William S. Marsh and Schuyler Marsh, and was contrived to defeat and delay the creditors of William S. Marsh, though not with the privity of the sheriff, and without proving or offering to prove any privity or knowledge on the part of the plaintiff of such colorable contrivance, or that the sale was

made under or through the same. The learned judge refused to receive such evidence unless the plaintiff was connected with it, or shewn to be privy to it; and as the defendant was not in a situation to give evidence of this latter character, he directed a verdict for the plaintiff, which was entered.

In Michaelmas Term last, *Hector Cameron* obtained a rule *nisi* to set aside the verdict, and for a new trial on the law and evidence, and for the rejection of evidence. He objected that there was no proof of judgment to support the execution on which the plaintiff relied in support of the sheriff's deed of the 5th of March, 1860: that the defendant's execution against William S. Marsh was in the sheriff's hands when Schuyler Marsh sold to the plaintiff, and that evidence was rejected that William S. Marsh supplied the money which Schuyler Marsh paid to the sheriff.

In this term *S. Richards*, Q. C., shewed cause. There was no proof, he contended, that there was any judgment against William S. Marsh on the 27th of April, 1859, when he made the conveyance to his son William; the evidence went no further than to shew that there were executions in the sheriff's hands about that time, so that under that deed the plaintiff made out a good title as a purchaser for value: again, the plaintiff made out a good title under the deed from the sheriff to Schuyler S. Marsh, and under the mortgage to Thompson: that he purchased without notice, and relying on the title to the vessel as registered in the proper books at the custom house, and that evidence to impeach his title without affecting him with notice was inadmissible. He cited *White v. Morris*, 11 C. B. 1015; *Douglass v. Bradford*, 3 C. P. 459; *McDade dem. O'Connor v. Dafoe*, 15 U. C. R. 386.

*Hector Cameron*, contra, argued that Thompson assigned his mortgage after the purpose for which it was given was satisfied: that the sheriff should have seized and sold the *Caroline Marsh* again under the subsequent writ put into his hands before Schuyler S. Marsh mortgaged to Thompson. He cited *Bowes v. Foster*, 2 H. & N. 779; *Boyson v.*

Gibson, 4 C. B. 121; McDonell v. McDonell, 9 U. C. R. 259; North v. Jackson, 2 F. & F. 198; Holmes v. Penney, 3 Kay & Johns. 99; Stapleton v. Haymen, 9 L. T. Rep. N. S. 655.

DRAPER, C. J., delivered the judgment of the court.

The defendant's execution in this case is against the goods of William S. Marsh, and is stated to have issued on the 11th of March, 1863, and to have been founded on a judgment. *The seizure was made on the 2nd of April following.* It does not appear when the judgment was entered. It may have been on the same day as the writ of *fi. fa.* is tested.

On the other side, the plaintiff's title to the schooner *Caroline Marsh* commences with a deed from William S. Marsh to his Son William Marsh, which was a voluntary deed. Next, by virtue of a *ven. ex.*, tested 13th September, 1859, against the goods of William S. Marsh, the sheriff sold and made a bill of sale on the 5th of March, 1860, to Schuyler S. Marsh, who, on the 21st of December, 1861, mortgaged the schooner to Thompson. On the 24th of March, 1863, William Marsh, the son, makes a voluntary deed of the schooner to Schuyler Marsh, who, on the same day, conveys her to the plaintiff for valuable consideration; and on the 28th of March, 1863, Thompson assigns his mortgage to the plaintiff.

It has not been objected that the provisions of the act for the registration of inland vessels have not been complied with, in respect to these different deeds under which the plaintiff claims.

It is conceded that the deed from William S. Marsh to his son, being voluntary, was void as against the father's creditors, though valid as between themselves. Within a year from this sale the sheriff sold the schooner on an execution at the suit of the Bank of Montreal against William S. Marsh, and neither of the parties to the voluntary deed have contested this sale. The son, on the contrary, made a voluntary conveyance to Schuyler Marsh, after this latter purchased at the sheriff's sale. The defendant, however, objects that this sale cannot be set up successfully against



him, because no judgment in favor of the Bank of Montreal against William S. Marsh has been proved to support the execution.

It has further been objected that the defendant should have been allowed to prove fraud affecting the sale and conveyance by the sheriff to Schuyler Marsh, by shewing that the money which was paid to the sheriff was the money of William S. Marsh, supplied by him to effect the purchase, and therefore that the schooner in reality remained his, and so was subject to the defendant's execution.

But is the defendant in a position which enables him to impeach the plaintiff's title? He is a stranger to the judgment between the Bank of Montreal and William S. Marsh, and he is setting up a title to the schooner in William S. Marsh, and not in himself. He only insists on his rights as a judgment creditor of William S. Marsh, while there is nothing to establish or even to raise a presumption that he was such creditor until his own execution issued, which was nearly four years after the deed to William Marsh, the son.

We do not see that the defendant has, under these circumstances, a right to require that the judgment should have been proved in order to sustain the plaintiff's title derived under the sheriff's sale.

Then as to the voluntary conveyance from William S. Marsh, the language of Sir *W. P. Wood*, in *Holmes v. Penny*, (3 Jur. N. S. 81) seems very applicable:—"Even where the deed is voluntary, the circumstance of there being no consideration will not of itself alone bring it within the statute; but it must be shewn to the satisfaction of the court, by all the concurrent circumstances of the case, that the necessary foreseen consequence of the deed was to delay or defeat existing creditors. As to subsequent creditors, the circumstance of the deed being voluntary has never, by itself alone, been held to make it fraudulent and void against them."

It is not pretended that the plaintiff has not paid a valuable consideration to Schuyler Marsh, nor that he had notice or knowledge of any circumstances affecting the title, other than those apparent on the different instruments which were

registered in the collector's office. He was warranted in dealing with Schuyler Marsh as a person having a good title by bill of sale from the sheriff, and having obtained a *quasi* affirmance of that sale by the deed from William Marsh, the son; while Thompson's conveyance, if it passed no title, would extinguish any claim under the mortgage made by Schuyler Marsh to him.

We do not find in the cases cited for the defendant any sufficient ground for holding that the plaintiff's title as a *bonâ fide* purchaser for value can be impeached; and we are consequently of opinion that as against the defendant the schooner was his property at the time of the seizure, and that the rule must be discharged.

Rule discharged.

---

## PAFFARD AND THE CORPORATION OF THE COUNTY OF LINCOLN.

*By-law—Assent of electors—By-law signed and sealed before obtaining—Place of meeting.*

A by-law to raise a loan, which required the assent of the electors, was on 11th of February signed by the warden, and sealed with the corporate seal, but it recited that the assent of the rate-payers to it was necessary, and contained full provisions for taking their votes. It was published, with a notice, stating it to be a proposed by-law to be taken into consideration on the 15th of March, and naming the times and places for voting on it. On the 15th of March the council passed another by-law, reciting verbatim that of the 11th of February as a by-law adopted on that day, and that it had been voted upon and approved of, and enacting that the said by-law be finally passed and be a by-law of the corporation.

*Held*, that notwithstanding the signing and sealing, the by-law under these circumstances was not illegal as passed on the 11th of February, before the assent of the electors, but that it should be treated as finally passed on the 15th of March.

It was stated in an affidavit filed in support of the motion to quash, that the true amount of the ratable property was not \$6,434,773, as stated in the by-law, but \$7,565,468. The clerk of the council, in answer, positively denied this, stating the true sum to be \$6,435,475. *Held*, that in the face of the clerk's affidavit the objection could not prevail, and that the difference between the sum in the by-law and that sworn to by him was unimportant.

*Held*, also, that the by-law of the 15th of March did not impose a rate, but had the effect only of finally passing the previous by-law, and therefore did not require the assent of the electors.

The introduction of the word "said" in the first by-law as recited in the second, which was not in the original, was treated as immaterial.

The by-law of the 11th of February was passed at St. Catharines, Niagara being the county town, but a by-law had been passed in 1862 to authorise the meetings of the council at St. Catharines. Secs. 130 and 131 of the Municipal Act direct the first meeting of the council to be on the fourth Tuesday in January at the county hall, and by sec. 136 subsequent meetings may be held elsewhere. *Held*, that the meeting was authorised.

In Easter term *J. H. Cameron*, Q. C., obtained a rule, calling on the corporation of the county of Lincoln to shew cause why their by-law passed on the 11th of February, 1864, entitled a by-law to raise by way of loan the sum of \$22,500, for the purpose of erecting a new county gaol, should not be quashed, on the following grounds:—

1. That the meeting at which the by-law was passed was illegally held at the town of St. Catharines, the corporation having no right to meet except in the county town, the town of Niagara.

2. That the by-law should have been submitted to the rate-payers of the county before it was passed, signed and sealed, but that it was passed by the corporation, signed by



the warden, and sealed with the corporate seal of the corporation, and was a complete by-law, before it was submitted to the vote of the rate-payers.

3. That the recital in the by-law, that the amount of the ratable property in the county liable to be assessed according to the last revised assessment rolls, being the rolls for 1863, was the sum of \$6,434,773, is incorrect, the true amount of the said ratable property according to the said rolls being \$7,565,468 ; and for such false recital the by-law is illegal.

4. That the rate in the dollar directed to be levied by the said by-law is erroneous and illegal, as the said rate is calculated on the incorrect amount of \$6,434,773, instead of upon \$7,565,468, the true amount.

The by-law recited that on the 13th of October, 1862, they had (under the statute 25 Vic., ch. 30,) passed a by-law changing the place of the county town from Niagara to St. Catharines, which was duly assented to by the electors, and was finally passed on the 11th of December, 1862, and was confirmed by act of the provincial parliament: that it was necessary to erect a new county gaol in St. Catharines, and for that purpose to raise \$22,500 by debentures: that it would require \$3,200 to be raised annually by special rate, for the payment of the loan and interest: that the amount of the whole ratable property of the county, according to the last revised assessment rolls of the county, and the several towns, townships and incorporated villages thereof, for 1863, was \$6,434,773: that for the payment of the debt, debentures and interest, and for creating a sinking fund, the corporation must raise annually by special rate, in addition to all other rates, from 1864 to 1873, half a mill in the dollar upon the whole ratable property of the county: that it was necessary the assent of the rate-payers should be had to the by-law. And it enacted, 1. That the warden might raise upon debentures \$22,500. The 2nd, 3rd and 4th sections related to the form of the debentures, when they should be payable, and the rate of interest. 5. To pay the debt and interest, a special rate of half a mill in the dollar was imposed until such debt, &c., should be paid. Sections 6 to 16, inclusive, provided for taking the votes of the muni-

cipal electors at certain named places. 17. The by-law was to come into force on the 31st of March, 1864.

To this was attached a public notice, that the above was a true copy of a proposed by-law passed by the corporation of the county, and which would be taken into consideration by the council of the county at a meeting to be held at the court house, in the town of Niagara, on the 15th of March, 1864, at 2 p. m.; and further stating the time and the several places for taking the votes of the electors. This was signed by the county clerk.

The relator's affidavit stated, that the court house in the town of Niagara had always been and was the proper and only place for the meetings of the county council: that the corporation had not nor ever had a county or other hall or place of meeting, their property, in the town of Saint Catharines: that the first meeting of the corporation in 1864, as well as the meeting on the 11th of February, 1864, were held in Saint Catharines: that the by-law of the 11th February, 1864, above set out, was passed in the town of Saint Catharines at that meeting, and was then read three times, and was signed by the warden, and sealed with the corporation seal, and was not submitted to the rate-payers until after it was so passed, signed and sealed: that a by-law passed on the 15th of March, 1864, though entitled *verbatim* as that of the 11th of February, was not a true copy thereof, and as finally passed was never submitted to the rate-payers: that the assessed value of the ratable property of the county liable to be assessed for the purpose of these by-laws, according to the assessment rolls for 1863, was \$7,565,468, and not the sum stated in the recital of the by-laws: that the rate in the dollar directed to be levied was wrong, being calculated upon \$6,434,773.

*J. H. Cameron*, Q. C., also obtained a rule to set aside the by-law of the 15th of March, 1864, on the following grounds: 1st. That it was never submitted to the rate-payers. 2nd. That it professed to adopt the by-law of the 11th of February, which had already been passed, signed and sealed, before it was submitted to the vote of the rate-

payers, and could not be again passed, signed and sealed, without being repealed, or newly introduced and submitted to the rate-payers. 3rd. That the recital of the assessed value of the ratable property was incorrect. 4th. That the rate in the dollar directed to be levied was incorrect.

The affidavit in support of this application was a repetition of that already set out.

This by-law recited that the corporation did on the 11th of February, 1864, adopt a by-law in the words following—setting it out *verbatim*—and that the said by-law was duly published according to law one month before the final passing thereof, and that to each copy published and posted was appended the notice required by law, and that on the day fixed by that by-law a vote of the electors of the several municipalities of the county was taken, and that the clerk of the council had certified under his hand that a majority of the electors approved of it; and it enacted that the said by-law be finally passed, and be a by-law of the corporation, and come into force on the 31st of March, 1864.

In this term *Robert A. Harrison* shewed cause.

He filed two affidavits, answering both rules together, which stated that the by-law of the 11th of February was passed at a special meeting of the corporation called by the warden for that particular purpose, and was not intended to be finally passed until a vote of the rate-payers was taken thereon: that at the meeting of the council of the 15th of March the said by-law was finally passed and confirmed by a resolution of the council, signed by the warden and sealed with the corporate seal, and at that same meeting the by-law of the 15th of March was passed:

That on the 28th of January, 1862, the corporation passed a by-law, by which the town hall of St. Catharines was declared to be the county hall of the county, and since then all the meetings of the corporation of the county had been held at the town hall in St. Catharines, except an adjourned meeting held at Niagara in March last, and a special meeting held at Beamsville on the 27th of October, 1863:

That the assessed value of the ratable property liable to be assessed for the purposes of these two by-laws, according



to the assessment rolls for 1863, was the sum of \$6,435,475, and not \$7,564,468.

In the schedule to this affidavit of the ratable property, the ratable value of the property in the seven townships was first stated, and then

“Town of St. Catharines, total annual  
value, real and personal property..... \$1,636,860  
Niagara, do. do..... 256,780  
Village of Port Dalhousie, do. do..... 111,530.”

These last three sums added to the ratable value of property in the seven townships, make up, \$6,435,475.

Croft and the Municipality of Brooke, 17 U. C. R. 269 ; Boulton and the Town Council of Peterborough, 16 U. C. R. 380 ; Hill and the Municipal Council of Walsingham, 9 U. C. R. 310 ; Sutherland and the Municipal Council of East Nissouri, 10 U. C. R. 626 ; Preston and the Corporation of Manvers, 21 U. C. R. 626 ; Michie and the Corporation of Toronto, 11 C. P. 244, were referred to on the argument.

DRAPER, C. J., delivered the judgment of the court.

The first objection relates to the place where the by-law of the 11th February, 1864, was adopted or passed in the first instance.

The Municipal Institutions' Act, sec. 131, requires that county councils must hold their first meeting at the county hall, if there be one, otherwise at the county court-house ; and (sec. 136) subsequent meetings may be held at such place as the council from time to time by resolution on adjourning, to be entered on the minutes, or by by-law may appoint.

The first meeting of the county council must, under sec. 130, have been held on the fourth Tuesday in January, 1864. There is no reason therefore to assume that the first meeting was on the 11th of February, and consequently it was competent for the council to meet on that day at St. Catharines, especially as there had been a by-law passed in January, 1862, authorising the holding meetings at St. Catharines.

It is objected, secondly, that this by-law was passed, signed and sealed, before it was submitted to the rate-payers for approval, and being thus completely passed it was void, because so passed before the vote of the electors had been taken upon it.

The 189th section of the act requires every by-law to be under the seal of the corporation, and to be signed by its head, or by the person presiding at the meeting at which it was passed, and by the clerk. When all this is done, it is in that state that is required for the obtaining a copy thereof under sec. 190, and an application may be made to quash it under sec. 195. In all these particulars, a by-law which had received the assent of the electors would not differ from one which had not, for it could not be truly stated when the by-law was first introduced that it had received the assent of the electors, and it could not, we apprehend, be altered by the introduction of substantial new matter, though it is not every such alteration that would make it the duty of the court to quash the by-law. (See Boulton and the Town Council of Peterborough, 16 U. C. R. 380.)

It is necessary (sec. 224) that this by-law should "before the final passing thereof," have received the assent of the electors under the 193rd section, and (sec. 225) it will not be valid unless it was passed at a meeting of the council especially called for the purpose of considering the same, and held not less than three months after a copy of such by-law at length, *as the same is ultimately passed*, together with a notice of the day appointed for considering the same, has been published in the manner directed.

For the relator it is insisted that this by-law was finally passed before it received the assent of the electors, and this appears to be the principal question. The word "by-law" is used in the statute not merely to designate an instrument containing all that is stated in the 189th section, but the same instrument also while still in the hands of the council and under consideration. Thus, under sec. 191, a rate-payer may under certain circumstances offer objections before the council "at the time at which *the by-law* is intended to be

considered." Sec. 192 states circumstances under which the council "shall not pass the by-law;" and so the 193rd section directs that the council shall by the *by-law* fix the time and place for taking the votes of the electors thereon, though in another part of the same section they call it the proposed by-law; and, again, they require a publication in a newspaper of a copy a month before the final passing of the proposed by-law, and in the same sentence direct that a copy "of the by-law" shall be put up in four or more public places. And it is required that the clerk of the council which proposed "the by-law" shall certify the result of the votes of the electors.

Nothing can be more free from doubt than that the statute prohibits the final passing of a by-law such as the one before us before it has been submitted to and approved by the electors. Do the circumstances before us shew that this by-law was finally passed before it was so submitted?

The affidavit of Mr. Rykert states that it "was finally passed and confirmed by a resolution of said council, and signed by the warden, and the seal of the corporation attached thereto," meaning apparently by the word "resolution," the by-law of the 25th of March: at least no other act of the council relative to the final passing is exhibited to us.

The clerk of the council appends to one copy of the by-law in question brought before us by the corporation these words: "Adopted in council at the shire hall, town of St. Catharines, the 11th day of February, A.D. 1864. The above by-law was finally passed and adopted in council at the council chamber, court house, Niagara, on Tuesday, the 15th day of March, A.D. 1864." On the other hand, the copy of the by-law produced on applying for this rule is certified by the same clerk under the county seal, on the 26th of April, 1864, without the note about the final passing on the 15th of March, an omission which is unexplained.

The by-law of the 15th of March recites almost *verbatim* that of the 11th of February, and further recites, that the vote of the electors was taken, and that the clerk of the council had certified that a majority approved of it; and it merely enacts that the said by-law be finally pas-



sed, and be a by-law of the corporation, to come into force on the 31st of March, 1864, which is the day named in the recited by-law, from which the debentures to be issued under its authority are to run; and it concludes by fixing the same day as that on which the recited by-law is to come into force. We see no sufficient reason why this may not be treated as the act of finally passing the recited by-law.

Among other reasons for this conclusion, the by-law of February expressly recites that "it is necessary that the assent of the rate-payers of the said county should be had to this by-law," and it contains full provisions for the taking the vote. This is a strong indication that the council were then dealing with this as a by-law not finally passed until that vote should be taken. The notice appended to it, that the by-law would be considered by the council at a meeting to be held at the court house, in the town of Niagara, on Tuesday, the 15th of March, 1864, and announcing the times and places for taking votes, shews also that the subsequent proceeding, or some subsequent proceeding, was then contemplated by the council and its officers for the final passing of the by-law.

We think, notwithstanding the signing and sealing, which we assume to have taken place on the 11th of February, the by-law on the face of it indicates plainly that it was not then finally passed, and the subsequent proceedings confirm this indication, and shew a final passing on the 15th of March. It would have been better, in our opinion, to have introduced and considered the by-law, and to have settled the form in which it was intended finally to pass it, providing therein for the reference to the electors. The remarks of Chief Justice Sir *J. B. Robinson*, in *Boulton* and the Town Council of Peterborough, (16 U. C. R. 380,) are well worthy of consideration. Although in the case of *Crofts* and the Municipality of Brooke, (17 U. C. R. 269,) the same eminent judge held that a seal was indispensable to a by-law, he was of opinion that in a proposed by-law the time and place of ascertaining the opinion of the electors might be fixed and determined.

Then as to the difference between the amount of the ratable property as stated in the by-law, and the amount as

sworn to by the relator, amounting to \$1,130,685. The clerk of the council, in his affidavit, positively contradicts the statement that the true amount is \$7,565,468, and affirms that it is \$6,435,475, while it is stated in the by-law to be \$6,434,773. The clerk of the council refers to the schedule annexed to his affidavit. The words "total annual value" are written and referred to as repeated opposite the entry of St. Catharines, Niagara, and Port Dalhousie, but the amounts for those three municipalities are added to those for the townships, which are clearly the amount of the value of the ratable property, and the sum total is that sworn to by the clerk as the assessed value of all the ratable property in the county, not the annual value, as to which, and to the converting into the ratable value, see "The Assessment Act," sec. 73. We cannot give affect to this objection in the face of the clerk's affidavit; and the difference between the sum sworn to by him and that stated in the by-law is too small to require serious notice.

The answer to the last objection is involved in the preceding observations.

Then as to the by-law of the 15th of March. If it did in fact impose a rate, the objection that it was not submitted to the rate-payers would be fatal to its validity, but we do not so construe it. It recites verbatim, with one very insignificant exception, the by-law of the 11th February. This exception is the introduction of the word "said" in the following way:—The by-law of the 11th February recited that a by-law of the 13th October, 1862, "was finally passed by the corporation" on the 11th of December, 1862, and the word "said" is introduced before the word "corporation." The by-law of the 15th March also recites the taking the votes of the electors, and the approval of a majority. Its sole enactment is that the by-law recited be finally passed, and that it come into force on the 31st of March, 1864, which is merely a repetition of a provision of the recited by-law.

We think this has no other or greater effect and operation, than as a formal solemn declaration by the council of their finally passing the recited by-law with the approval of the

electors, and that beyond this it neither has nor can have any effect whatever.

The other objections to this by-law were raised to that of February, and have been noticed and overruled.

On the whole, we are of opinion this rule must be discharged with costs.

Rule discharged.

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CLARK V. ARTHUR GALBRAITH, SOPHIA LALANNE, AND  
EDWARD D. LALANNE.

*Several defendants—Unauthorised appearance for one—Proceeding after notice of—Practice.*

In an action against three partners, upon notes signed by and for goods sold to the firm, C., an attorney, appeared on the 24th of March for all the defendants, his only instructions being, as he swore, from one of them, to defend for time. On the 29th G., another defendant, appeared by his attorney, S., who, on the 6th of April, notified the plaintiff's attorney to serve the declaration and all other papers on him, or that the proceedings would be moved against. He heard nothing more, however, until after final judgment, which was entered on the 13th of April, a verdict having been taken on the same day upon a consent signed by C. When the declaration was filed or served did not appear.

*Held*, that the proceedings against G., subsequent to the appearance entered by S. for him, must be set aside, with costs.

*S. Richards*, Q. C., in Easter Term last obtained a rule calling on the plaintiff to shew cause why the verdict obtained by him at the last Peterboro' assizes and the judgment entered thereon, and all subsequent proceedings, or all the proceedings subsequent to the appearance for Galbraith, should not, as against Galbraith, be set aside, on affidavits setting forth the following circumstances:—

The writ issued on the 17th of March, 1864. The defendant Galbraith employed one Scott, an attorney, to defend him, and on the 29th of March Scott duly entered an appearance for him as his attorney.

On the 24th of March Coleman, another attorney, entered an appearance for all the defendants. Soon after he had appeared, apparently about the 5th of April, Scott was informed of the appearance of Coleman, and immediately



wrote to him, stating his own employment by Galbraith, and asking Coleman to withdraw his appearance for Galbraith, as it must have been a mistake. Scott also wrote to the same effect to the plaintiff's attorney, and required him to serve all papers on him, (Scott,) stating that if this was not done the proceedings would be moved against, and that Galbraith had a good defence.

No declaration or other paper or proceeding was served on Scott, nor had he notice or knowledge of the proceedings after his appearance until after final judgment had been entered, which information he got on the 14th of April last.

On the 2nd of April Coleman filed a plea of payment for all the defendants.

Final judgment was entered on the 13th of April, 1864, for \$1,312.48 damages, and \$78.10 costs, on a verdict endorsed on the *nisi prius* record, in these words: "Verdict for plaintiff for \$1,312.48, and damages, pursuant to an admission annexed to the record." Immediate execution was granted. Among the papers in the cause was an admission signed by Coleman, to the effect that he consented to a verdict to the full amount of claim on the writ.

Galbraith swore that he never authorised any person to retain Coleman to appear for him: that on being informed Coleman had appeared he wrote to him, stating the instructions given to Scott to appear: that he believed the judgment was obtained by collusion between his partner, Edward D. Lalanne, one of the defendants, and the plaintiff, in order to give the plaintiff an undue preference over the other creditors of the defendants: that both the defendants Lalanne resided out of the jurisdiction of the court: that the cause of action arose upon certain promissory notes made in the name of Galbraith & Co., and for goods alleged to have been sold and delivered by the plaintiff to the defendants, then trading under the name of Galbraith & Co., at Napanee: that the plaintiff resided and carried on business at Montreal, and that the promissory notes were made by said Edward D. Lalanne, (then residing in Montreal,) in the name of Galbraith & Co., and the goods, if purchased, were purchased in Montreal: that he had a good defence on the merits, as he was advised and believed.

*C. S. Patterson*, in the following term, shewed cause, citing *Hambidge v. De la Crouée*, 3 C. B. 742; *Bayley v. Buckland*, 1 Ex. 1; *Harrison v. Jackson*, 7 T. R. 208.

He filed affidavits, stating that the defendants were in very embarrassed circumstances, and that the plaintiff's chance of being satisfied the debt due to him, which was very explicitly sworn to by the plaintiff, depended almost wholly on his holding the judgment entered; and he denied any collusion with either of the Lalannes to obtain the judgment.

Mr. Coleman made an affidavit that he received his instructions from Edward D. Lalanne to defend for time only: that he gave a consent in writing that the plaintiff might take a verdict "long before" he was informed that Scott had entered an appearance for Galbraith, and to save the expense of bringing up a witness from Montreal to prove the open account, which, according to the plaintiff's affidavit, amounted to \$23.10: that on the sixth day of April, 1864, he first knew that Scott had appeared, when he received the letters from Scott and Galbraith, respectively mentioned in their affidavits: that the cause was at issue, and notice of trial given on the 2nd of April, for the Peterboro' assizes, on the 12th of April.

The plaintiff's attorney swore that he first knew that Scott had appeared for Galbraith on the 5th of April, when, being in the office of the deputy clerk of the Crown at Belleville, he saw on the desk a paper purporting to be such appearance, but no memorandum of its being entered endorsed upon it, and called the attention of the deputy clerk of the Crown to it, who then endorsed it as entered on the 30th of March, alleging that it was mislaid, and could not then be found. He stated that the defendants had assigned their effects to one Easton, for the benefit of their creditors: that the sheriff of Frontenac, Lennox and Addington, took possession of defendants' personal estate under execution, and, as he believed, had made part of the money on the execution in this cause: that this application was in reality made on behalf of one Harty, a merchant of Kingston, who had an execution against Galbraith and Edward Lalanne in the sheriff's hands, next in priority to that of the plaintiff:

that he received Scott's letter on the 6th of April, 1860, "long after" the cause was at issue and notice of trial given. He did not state when the declaration was filed, but swore that "this cause was, after certain and necessary proceedings had in due and proper course of time, at issue on the 2nd of April, 1864," and notice of trial was on the same day given: that the consent to taking a verdict was given by Coleman, to save the expense of bringing up a witness from Montreal.

Edward D. Lalanne swore to the correctness of the plaintiff's claim, and denied collusion to give him a preference; and that he held a power of attorney from Sophia Lalanne to transact all business, prosecute and defend suits, and to employ attorneys.

*S. Richards*, Q. C., in support of the rule, cited Lindley on Partnership, vol. i., p. 227.

DRAPER, C. J., delivered the judgment of the court.

The following dates appear:

Writ issued the 17th of March, 1864; when served does not appear.

Appearance by Coleman 24th March, for all defendants.

Appearance by Scott for Galbraith, the 29th or 30th of March.

Plea by Coleman, the 2nd of April, 1864.

Issue joined, and notice of trial on the same day for assizes at Peterboro', which began on the 12th of April; and the verdict was taken on the 13th, and judgment entered on that day.

Plaintiff's attorney received notice from Scott on the 6th of April, that he defended for Galbraith, and required the declaration and other papers to be served on him, and that if this was not done, he would move to set the proceedings aside.

From Edward Lalanne's affidavit, it seems he resides in Lower Canada. There is nothing to shew when or where he was served with the writ of summons, nor that he ever was served. Neither his affidavit nor that of Mr. Coleman shew



when the instructions to defend were given. It is consistent with all that is sworn on the plaintiff's part, that neither of the Lalannes were served, but that Edward Lalanne wrote to Mr. Coleman to appear for all the defendants, instructing him, as Mr. Coleman swears, to defend "for time only." E. Lalanne does not pretend to have had authority to employ an attorney for Galbraith. Neither the plaintiff's attorney nor Mr. Coleman state when the declaration was filed or served. The writ could scarcely have been served before the 18th or 19th of March. If served in Upper Canada, the defendant was only bound to appear within ten days after service, and it is at least probable that the appearance by Scott for Galbraith, which is stated in one of the affidavits to have been entered on the 29th of March, was entered on the last day. Mr. Coleman seems not to have considered his instructions to defend "for time" to have required him to delay appearing till the 29th. If the declaration had been filed and served on that day, the plaintiff could not have got to trial on the 12th of April, the first day of the Peterborough assizes, but by appearing on the 24th he gave the plaintiff's attorney just a little more than time to declare, take issue on the plea of payment, and give notice of trial.

It is not asserted on the part of the plaintiff that either Lalanne or Galbraith gave Mr. Coleman authority to consent to a verdict. He justifies this, as saving the expense of bringing a witness from Montreal to prove \$23.10c., the verdict being for upwards of \$1,300, and all of it except this small sum being on promissory notes, which I do not doubt were declared upon, and were therefore admitted by the plea of payment. It may be well doubted, after reading the affidavits filed by the plaintiff, whether Galbraith has a defence on the merits, but there is no room for doubt that the plaintiff's attorney had notice on the 6th of April that Galbraith would apply to set aside his proceedings.

We cannot help noticing that Mr. Coleman swears he gave a consent in writing that the plaintiff might take a verdict "long before" he was informed Scott had entered an appearance, and the plaintiff's attorney swears he received

Scott's letter "long after" the cause was at issue and notice of trial given. "Long after" here means from the 2nd of April, when the plea was filed, to the 6th of April, when he got the letter. It does not appear when the consent was given by Mr. Coleman. It cannot be presumed to have been before he filed the plea, and if so "long before" will cover the same interval as "long after," *i. e.*, three whole days and fractional parts of two others. If this was done by E. Lalanne's direction or with his assent, it would weaken the force of his denial of the collusion charged.

As to the law, the cases of *Hambidge v. De la Crouée*, (3 C. B. 742,) and *Bayley v. Buckland*, (1 Ex. 1,) contain principles for our guidance.

The defendant Galbraith was served with the writ and employed an attorney to defend him, who entered an appearance in sufficient time. There is no reason to suppose that the declaration was then filed, at least it does not so appear. The plaintiff's attorney was notified of the appearance for Galbraith by the attorney whom he had employed as promptly as the circumstances reasonably allowed, but he persevered in treating the unauthorised appearance as binding upon Galbraith. There was therefore no omission on the defendant's part. It may be true that the plaintiff took some steps and incurred some expense owing to the unauthorised appearance, but we do not think that justified his proceeding after he became aware of the truth; and he thus placed himself in the wrong. Besides, after the notice he had he took a verdict on the consent of the same attorney, who, as he had been notified, had appeared without authority for Galbraith, and who shews no authority from any one to give such a consent, his only instructions, so far as is stated, being to defend for time.

We think the rule should be made absolute to set aside all the proceedings against Galbraith subsequent to the appearance entered for him by his own attorney, with costs.

Rule absolute.

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## GOODEVE ET AL. V. WALLACE ET AL.

*Mortgage—Default—Ejectment.*

Defendants mortgaged land to the plaintiffs for the payment of £875 on the 23rd of June, 1864, and interest half yearly on the 23rd of June and December, with a proviso for entry by the mortgagees after and possession by the mortgagors until default. The interest due on the 23rd of June, 1863, being in arrear, on the 11th of December following the plaintiffs brought ejectment. Defendants' attorney paid the interest up to the 23rd of that month, and on the 29th of July following, the principal not having been paid, judgment was entered for want of appearance, and a writ of *Hab. Fac. Poss.* issued. The defendants' attorney swore that this payment was accepted in satisfaction of the suit, which the plaintiffs' attorney denied.

*Held*, (rescinding an order made in Chambers,) that the judgment was regular, for the admitted default in the interest vested the land absolutely in the plaintiffs, and the subsequent payment could not divest it; defendants' only remedy being an application for relief under the 7 Geo. II., ch. 20, or under the last proviso in the mortgage.

*S. Richards*, Q. C., obtained a rule calling on the defendants to shew cause why the order of Mr. Justice *Adam Wilson* in this cause, made on the 6th of August, 1864, ordering the judgment and writ of *Hab. Fac. Poss.* to be set aside, should not be rescinded, on the ground that there was no breach of faith in signing said judgment: that the action had not been satisfied or ended when the judgment was signed: that notice to defendants of the intention to sign judgment or to proceed was not necessary; and that the judgment was legal and regular.

Upon the affidavits and papers filed, it appeared that on the 2nd of June, 1862, the defendant Wallace mortgaged to the plaintiffs the lands to recover possession whereof this action of ejectment was brought. The proviso in the mortgage was for the payment of £875, on the 23rd of June, 1864, with interest at the rate of six per cent. from the 23rd of December, 1861, payable half yearly, on the 23rd of June and December in each year. Default was made in the payment of the interest which fell due on the 23rd of June, 1863, and on the 11th of December following this action was commenced. Early in March the plaintiffs' attorney was applied to by the defendants' attorney to make up the sum then past due and the costs, saying he would pay that sum. The plaintiffs' attorney swore that the defendants'



attorney also told him that the bank of Montreal, which was one of the defendants, would pay the residue of the moneys secured by the mortgage when they fell due. The plaintiffs' attorney made up the amount of the interest due when the action was begun, and added the interest which fell due on the 23rd of December, which, with costs, came to \$246.69, and the defendants' attorney paid him that amount. On the 29th of July following, judgment was entered for want of an appearance, and a writ of *Hab. Fac. Poss.* was issued and delivered to the sheriff.

The defendants' attorney swore that on the 5th of March last he paid the sum of \$246.69, and that it was accepted by the plaintiffs' attorney in full satisfaction and discharge of this action.

The plaintiffs' attorney swore that, with the exception of the defendants' attorney asking him to make up the costs, nothing whatever was said about the suit, and the sum of \$246.69 was paid in liquidation only of the amount so made up, and for no other purpose whatever: that such sum was neither paid nor accepted in discharge of this action, but only of the amount so made up; nor was he asked to release or discharge the action: that about the 1st of July last, he went to the bank of Montreal at Cobourg, with the mortgage and a discharge thereon, ready for delivery, for the purpose of getting the residue of the moneys secured by the mortgage, which fell due on the 23rd of June, but the manager refused to pay, and afterwards the judgment was entered.

Upon these affidavits, Mr. Justice *Adam Wilson*, after hearing the parties on a summons, ordered the judgment and the writ of *Hab. Fac. Poss.* to be set aside without costs.

*Moss* shewed cause, citing *Croft v. Lumley*, 5 E. & B. 648. *S. Richards*, Q. C., contra, cited *Consol. Stats. U. C.*, ch. 27, secs. 74 and 75.

DRAPER, C. J., delivered the judgment of the court.

Upon examining the copy of the mortgage put in before

the learned judge in Chambers by the plaintiffs' attorney, we find among the mortgagor's covenants one to the following effect:—that after default in the payment of the principal or of the interest thereof, contrary to the proviso, it shall be lawful for the mortgagees to enter into, have and enjoy the said lands, without hindrance or denial from the mortgagor; and also that after any such default the mortgagor will execute further assurance; and at the end a proviso that until default made in the payment of the principal or of the interest, the mortgagor may have possession.

The mortgage was in fee, and was in law a conditional sale to the mortgagee. Immediately on its execution the land vested in the mortgagee, subject to be divested by payment at the day of the principal sum, the interest having been paid in the interim on the days appointed. But if the money be not paid according to the terms of the proviso, the land is discharged of the condition, and becomes vested absolutely in the mortgagee; and as we understand the law, the mortgagor, after the condition is thus gone, cannot re-possess himself of his legal estate by simply paying the money. The estate of the mortgagee having once become absolute at law, can only be re-invested in the mortgagor by a conveyance from the mortgagee.

Now, applying these principles, the admitted default of the mortgagor in payment of the interest gave the mortgagee a right to maintain the ejectment, because from the moment of that default the condition in favour of the mortgagor was gone. The mortgagor might apply for relief to the equitable consideration of the court, and if not entitled under the 7 Geo. II., ch. 20, to stop the proceedings without payment of all the mortgage money, might, in view of the last proviso, be relieved on payment of what was then due, perhaps by a stay of execution but suffering judgment to be entered.

In this case, however, the summons for setting aside the judgment was issued on the ground that the judgment was signed against good faith, and after this action had been settled between the parties, and after the plaintiffs had

accepted \$246.69 in full satisfaction and discharge thereof. The affidavit of the defendants' attorney warranted this, at least to the extent that the money was accepted by the plaintiffs' attorney in full satisfaction and discharge of this action.

This statement is in direct terms denied by the plaintiffs' attorney in his affidavit, swearing "that the said sum was not paid nor was the same accepted by me in full satisfaction and discharge of the action;" and he adds a statement respecting payment of the principal, which, on shewing cause to the rule, the defendants' attorney had the opportunity of answering, though he has not done so.

In our opinion the only ground to rest an interference upon was the statement above mentioned as to acceptance in satisfaction, and the inference of breach of faith arising therefrom. But this ground is destroyed by an equally positive denial of the statement, and consequently the charge of breach of faith is repelled.

It appears to us, therefore, the rule should be made absolute.

Rule absolute.

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**BERRYMAN v. THE PRESIDENT, DIRECTORS, AND COMPANY  
OF THE PORT BURWELL HARBOUR.**

*Harbour companies.*

Remarks as to the duty of harbour companies to keep the harbour free from obstructions, and their liability for neglect.

In this case the question whether the obstruction which caused the loss of the plaintiff's vessel was an act of negligence on defendants' part, was left to the jury upon conflicting evidence, and the court refused to interfere with a verdict in their favor.

The declaration stated, by way of inducement, that the defendants were incorporated for the purpose of constructing a harbour at Port Burwell: that they constructed piers and wharves, and dredged a harbour, and by reason thereof, and under their charter, levied tolls upon vessels entering the harbour: that by reason of the premises it was the duty of the defendants to keep the harbour in reasonable repair,



and free from sand-bars and obstructions during the season of navigation: that for a long time before, and on the 13th of November, 1862, defendants negligently suffered the harbour to become obstructed by a sand-bar, and wrongfully neglected to remove the same within a reasonable time after they had knowledge of the formation thereof, which sand-bar, at the time of the damage hereinafter mentioned, was below the surface of the water, and obstructed the harbour; and thereupon it became defendants' duty to remove it, and until the obstruction was removed to give notice that the harbour could not be safely entered, or to place a buoy in the immediate vicinity of the obstruction, so as to enable persons to avoid the same—yet defendants did not remove the obstruction within a reasonable time after they had notice thereof, nor did they place a buoy to denote that the harbour was obstructed, nor close the harbour. By means whereof the plaintiff's vessel, "The Northern Light," which had before entered the harbour, while lawfully passing into the harbour for the usual tolls, and the persons in charge of the vessel being unable to see the obstruction, and having no knowledge thereof, stranded on the said obstruction, and was thereby wholly lost.

*Pleas.*—1. Not guilty. 2. That the plaintiff, and the persons in charge of the vessel, had full notice and knowledge that the said bar or sand-bank existed.

The trial took place at St. Thomas in March, 1864, before *Morrison, J.*, and the jury found for defendants.

In Easter Term *Robert A. Harrison* obtained a rule calling on the defendants to shew cause why there should not be a new trial, on the ground that the verdict was perverse, and contrary to law and evidence, and the learned judge's charge. In the following term *Becher, Q. C.*, shewed cause.

*Harrison*, in support of the rule, cited *Webb v. Port Bruce Harbor Co.*, 19 U. C. R. 623; *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 164; *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223; *Thompson v. North Eastern R. W. Co.*, 3 L. T. Rep. N. S. 618; 6 L. T. Rep. N. S.

127, 129; *Mersey Docks and Harbour Board v. Penhallow*, 5 L. T. Rep. N. S. 112.

DRAPER, C. J., delivered the judgment of the court.

The law applicable to this case appears to be very well settled. The declaration shews the harbor to have been constructed by the defendants, an incorporated company, alike for the benefit of the public and the profit of the stockholders, under the authority of the act, (though not so stated in the declaration,) 12 Vic. ch. 160; and having availed themselves of the privileges conferred, it was their duty to take reasonable care, so long as they kept the harbor open for their own benefit, to maintain it in such a condition that it might be used by the public, or, more strictly speaking, by persons navigating vessels of the class which the harbour was calculated to receive, without danger of loss of life or property. The case of *Thompson v. The North Eastern Railway Company*, (2 B. & S. 106,) is the latest we have seen, and refers to the leading previous decisions on the subject.

It does not, however, follow that this duty extends to keeping the harbor, or the approaches to it, absolutely free at all times from all obstructions. Natural causes, according to the evidence, would render this impossible. Where the sand in and along the lake shifts more or less with every heavy gale, and suddenly forms bars and shoals in the water, and especially near artificial obstructions, such as wharves and piers, or off the mouth of streams running into the lake, it would be unreasonable and unjust to hold the defendants, or others similarly circumstanced, liable for losses arising exclusively from such causes. Nor are we prepared to say that the existence of some obstruction arising from such causes within a harbor of this description, although one that might be removed or reduced, would necessarily infer liability to the company, if the harbor was, nevertheless, reasonably accessible, and fit for the reception of vessels. Time must necessarily be allowed for the removal of an obstruction so created. If it renders the entrance to the harbour dangerous, every possible notifica-

tion of the danger should be given, and every available precaution taken for the safety of vessels using it, and even then, it is not difficult to suggest cases where the harbor company would be liable, so that the most prudent course would be to close the harbor until repaired or restored to a proper condition.

In this case, as in that of *Webb v. The Port Bruce Harbor Co.*, (19 U. C. R. 623,) the question was for the jury. It was a question of fact upon the evidence whether the obstruction, which extended from the eastern towards the western pier, was an act of negligence on the part of the defendants which caused the loss sustained by the plaintiff. There is no doubt that there was an obstruction, nor that the plaintiff's vessel was lost from running on it, and these facts being clearly established went a long way to support the plaintiff's case. On the other hand, the vessel had been in and out of the harbor shortly before, without apparent difficulty, in charge of the same captain, (who was a witness at the trial,) and much deeper laden than on the present occasion. The weather was fine; it was broad daylight; and the captain appears to have known that the channel into the harbor ran along the western pier. There is no evidence to shew that there had been any recent change in the character of the entrance; in other words, that it was not in the same state as when the vessel last entered and left it. The defendants, it appeared, had a dredge, which they employed for clearing and deepening the channel. There was also evidence which might occasion doubts and unfavourable impressions as to the condition and the management of the vessel, and as to the course followed by the captain in taking her into the mouth of the harbor—all which was left to the jury in a charge to which no objection has been taken; and although a contrary verdict might, as appears to us, have been justified by the evidence, and would probably not have been interfered with by the court, we do not see any clear ground for granting a new trial.

Rule discharged.



## BENNETT V. COVERT.

*Railway Co.—Liability of sub-lessee.*

*Held*, (reversing the judgment of the County Court,) that defendant, a sub-lessee of a railway company under "*The Railway Act*," Consol. Stat. C., ch. 66, was not liable for neglect to maintain fences, by which the plaintiff's cattle had been killed.

A nonsuit may be ordered where there are issues of law and fact, and the former undetermined.

This was an appeal from the judgment of the County Court of the County of Peterborough, discharging a rule *nisi* obtained by the defendant to set aside a verdict and to enter a nonsuit, pursuant to leave reserved.

The declaration contained five counts. The first count alleged that at the time of the committing the injury complained of, the defendant was interested in and was possessed of and worked the railway running from the village of Milbrook, in the township of Cavan, in the County of Durham, to the town of Peterborough, in the County of Peterborough, which said railway was constructed under and by virtue of a charter thereof, granted to the Port Hope, Lindsay, and Beaverton Railway Company; and that at the time the injury was committed it was the duty of the defendant, so being interested in and possessed of, and so working the said railway, as aforesaid, to erect and maintain sufficient fences on the line of the route of the said railway; yet the defendant neglected to erect and maintain sufficient fences upon the line of the route of the said railway, where the same crossed the plaintiff's land, being the east half of lot number 8, in the 10th concession of the township of Monaghan, in the said county—by reason whereof one cow and one heifer of the plaintiff strayed from off the plaintiff's said land, where they lawfully were, to and upon the said railway, and the said heifer was killed and the cow was greatly injured by the locomotive and cars of the defendant running upon and over the said railway, and so worked by the defendant as aforesaid.

The second count was to the like effect, charging the killing of and injury done to other cattle of the plaintiff by the same means.

The third, fourth, and fifth counts charged the defendant with wrongfully killing and injuring the plaintiff's cattle generally, and through negligence, default, &c. ; and for the purposes of this judgment are unnecessary to be set out.

The pleas were, 1st, not guilty, and three special pleas, the plaintiff taking issue on all the pleas, and demurring to the last special plea, with joinder in demurrer. It did not appear that the demurrers had been argued.

At the trial the evidence, as appeared by the judge's notes, was far from being satisfactory on every point, but it went to shew that the railway was leased by the Port Hope, Lindsay, and Beaverton Railway Co. to George Tate and John Fowler, and from a copy of a memorial filed in the registry office of Peterborough, received as evidence, it appeared that John Fowler assigned to the defendant that lease. No evidence of negligence on the part of defendant was given, nor did it appear how or when, or by what means the cattle were killed, but it was inferred that being found on the railway track they were killed by the passing train. It was in evidence that the fences were faulty, being destroyed by fire long previous to the killing of the cattle.

At the close of the plaintiff's case the defendant's counsel objected that there was no evidence as to how the cattle came upon the railway track : that the plaintiff was guilty of negligence in the managing of his cattle, and could not recover : that no evidence of improper management of the train was offered : that defendant was not shewn to have been connected with the injury in question in any way : that there was no law casting upon the defendant any responsibility for the erecting of fences, that duty being thrown on the railroad company, who should have been sued, and not the defendant ; and that there was no charge of negligence, except as to failure in erecting and maintaining fences, &c.

Leave was reserved to move to enter a nonsuit, and the learned judge charged the jury as to the first three counts, that before they found a verdict they must be satisfied that the cattle came from the premises of the plaintiff on the line of railway : that they so got on by reason of the want

of a sufficient fence, and that such fence was wanting, either from never having been there, or from the defendant having suffered or permitted it to be thrown down; and that they must be satisfied that the animals were injured and destroyed through the locomotives of the defendant, as alleged in the declaration. And as to the last count, that from the evidence of a witness called to support it, the destruction of the fences occurred in 1860, while defendant's connection with the railway did not commence until 1861; and he asked the jury to find on that point.

The jury gave a verdict for £22 17s. 0d., and found that the fences were injured and unlawful since 1860.

In the following July term, 1864, the defendant's counsel obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit on the leave reserved, or for a new trial, the verdict being against law and evidence, renewing his objections made at the trial as the grounds for his rule, which rule *nisi*, after argument, was in the same term discharged with costs.

The learned judge, in giving his judgment, said, "The plaintiff has already been put to the trouble and expense of appealing," (See 13 C.P. 555,) "and although I confess I am unable to see the force of Mr. Burnham's argument, that he is liable at common law, nothing being in evidence to shew that the animals were killed by negligence when on defendant's track, yet both parties having made up their minds to appeal, so as to get a decision on the point of liability to fence and maintain fences, so important to the defendant, I shall, though very doubtful whether he is liable under this statute, give judgment for the plaintiff, and this time throw on the defendant the burthen of the appeal."

*C. S. Patterson*, for the appellant, cited *Bennett v. Covert*, 13 C. P. 555; *Ricketts v. East and West India Docks, &c.*, *R. W. Co.*, 12 C. B. 160.

*Crooks*, Q. C., for the respondent, cited *Ellis v. London and South Western R. W. Co.*, 2 H. & N. 424; *Roberts v. Great Western R. W. Co.*, 27 L. J. C. P. 266, S. C. 2 C. B. N. S. 506; *Pickard v. Smith*, 10 C. B. N. S. 470; *Redfield on Railways*, 434; *Shelford on Railways*, 535.



The clauses of the statute bearing upon the question are referred to in the judgment.

MORRISON, J., delivered the judgment of the court.

The principal question arising on this appeal, and which was argued at the bar, is, whether the defendant is liable in this action, he being a sub-lessee of the Port Hope, Lindsay and Beaverton Railway Company.

It was contended on the part of the defendant that it was not the duty of the defendant, as alleged in the declaration, to erect or maintain fences on the line of the railway: that that duty, by our Railway Consolidation Clauses Act, was cast on the company, the provisions of which did not apply to the defendant. On the part of the plaintiff, it was contended that defendant, as lessee, or person working the railway, was liable by the express words of the statute or by implication. It was conceded that at common law there is no obligation to fence.

We can find no English decision bearing on the point in question, which we account for by the Railway Consolidation Clauses Act of England, 8 & 9 Vic., ch. 20, containing special provisions to meet cases like the present, for by the 112th section of the English Act, it is enacted that where companies are authorised to lease their railways, or any part thereof, the lease shall contain all usual and proper covenants on the part of the lessee to maintain the railway in good and proper repair and working condition, &c.; and the following section enacts that such lease shall entitle the lessee to all the powers and privileges granted to the company, or its directors or officers, with regard to the possession, enjoyment and management of the railway, &c.; and such lessee shall, with respect to the railway comprised in such lease, be subject to all the obligations by that act or the special act imposed on the company. Our act respecting Railways, Consol. Stats. C., ch. 66, contains no such provisions.

We have also looked into American authorities. The only case we could find in some measure like this is one referred to in Redfield on Railways, p. 435, Linfield v. Old

Colony Railroad Corporation, (10 Cushing's Reports, 562.) There the action was brought against a railway corporation, the lessees of another railway, for not carrying or ringing a bell on the engine while using the leased railway. It was there urged by the defendants' counsel that, being mere lessees, the defendants were not liable (which was apparently conceded) unless the defendants came within the provisions of a section of their revised statutes, which required every railway corporation to carry a bell on every engine passing upon their road. And the court held that as the defendants were a railroad corporation, and were authorised to lease the particular railway, that during the continuance of the lease it was their road, within the meaning of the section, and that they were liable.

This case therefore depends upon the construction of our act respecting railways, ch. 66, Consol. Stat. C., and the special act incorporating the lessors of the defendant. By the special act those clauses of the General Railway Act, headed "Fences" are incorporated with it. By the 13th section, it is the duty of the company to erect fences, &c., and by the 15th section, until such fences are duly made, *the company shall be liable* for all damages which may be done by their trains or engines to cattle, horses, &c., on the railway; and by the 16th section, after the fences have been duly made, and while they are duly maintained, no such liability shall accrue for any such damages, unless negligently and wilfully done.

The plaintiff's counsel referred to the 192nd section of the act, which enacts that in the construction of the 140th to 150th sections, &c., of that act "the expression 'railway company' shall include any person being the owner or lessee of or contractor working any railway constructed or carried on under the powers of an act of parliament," and also to the 150th and 158th sections, as affecting the defendant; but on reading these latter sections, we cannot see that they have any bearing on this case. But when we look at the 16th sub-section of section 7, the interpretation section, and section 192, we can see from the statute itself what the Legislature intended: namely, that in the construction of

certain sections of the statute, enumerated in section 192, the words "railway company" shall be taken to mean lessee of the railway, none of which enumerated sections create any liability to fence the line of railway as contended for by the plaintiff, while by sub-section 16 of section 7, in the construction of all the other sections, including 13, 15 and 16, which create the duty of the company to fence, and their liability to damages, the expression "the company," which is used in those sections, "shall mean the company or party authorized by the special act to construct the railway," neither of which definitions apply to the defendant.

We have not overlooked the suggestion made by Mr. Crooks, that working a railway, being a dangerous employment, cast upon the defendant the obligation or duty to fence the line, but we can find no authority to that effect, while the leaning of the cases bearing on the point is rather the other way. But in this case neither the pleadings or the evidence raises the point.

We are of opinion that the appeal should be allowed, and that the verdict should be set aside, and a nonsuit entered in the court below.

At first sight I thought, from the state of the pleadings, there being issues in fact and law on the record, and the issues in law undetermined, that some difficulty might arise by ordering a nonsuit to be entered; but a party may be nonsuited where there are issues in law and fact, and a venire awarded to try the issues and assess contingent damages. In that case no damages can be assessed upon the demurrer, the plaintiff being out of court.—See Ch. Arch. Prac. 917, 11th ed., and *Snow v. Como*, (1 Str. 507.)

Appeal allowed.

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## REGINA V. EMILY MUNRO.

*Conviction by police magistrate under C. S. C., ch. 105, for keeping a disorderly house—Habeas corpus—Objections available on application for discharge—Police limits, &c.*

The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen Street, in the said city," &c., and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued; in return to which the commitment, conviction, information and depositions were brought up. On application for her discharge:—

*Held*, 1. No objection that the commitment stated the offence to have been committed on the 10th of August, instead of the 11th, as in the conviction, the variance not being material to the merits.

2. Nor that the commitment charged that the prisoner "was the keeper of," &c. and the conviction "that she did keep," both differing from the statute, which designates the offence as "keeping any disorderly house," &c.—for all these expressions convey the same idea.

3. Nor that the commitment did not shew that the offence was committed within the "police limits" of the city, the words used in the act, Consol. Stats. C., ch. 105, sec. 14—for there was no ground for supposing any difference between these and the ordinary city limits.

4. Nor that there was nothing to shew whether the prisoner pleaded to the charge or confessed it.

5. Nor that the conviction was not sustained by the information, the latter being that defendant was the keeper of a disorderly house, and the former for keeping a common disorderly bawdy house—for the commitment would not be void because of a variance between the original information and the conviction made after hearing evidence.

6. Nor that no notice had been put up as required by sec. 25 of the same act, to shew that the court was that of the police magistrate, not of an ordinary J. P.—for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice.

7. Nor that there was no evidence to warrant the conviction—for when a proper commitment is returned to a habeas corpus, and there was evidence, the court will never enter into the question whether the magistrate has drawn the right conclusion from it.

8. Nor that the offence of keeping a common disorderly bawdy house was not sufficiently certain—for the legal meaning of the last two words is clear, and if keeping a disorderly house be no offence, the addition of that would be only surplusage.

*Seemle*, that on an application like this affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him; but that such conduct may furnish ground for a criminal information.

*Quære*, with regard to some of the objections, whether the court, on such an application, can go behind the warrant of commitment.

*Quære*, also, whether the certiorari properly issued without complying with the requirements of 13 Geo. II., ch. 18, though the object was not to quash the conviction.

On the 2nd of September, 1864, a writ of *Habeas Corpus* issued from this court, directed to the keeper of the common gaol of the city of Toronto, to bring up the body of Emily

Munro, with the day and cause of her keeping and detainer. At the same time a writ of *certiorari* was issued to bring up a conviction of the said Emily Munro. \*

On the following day, being the last day of term, the keeper of the common gaol returned that he had the body, &c., and that the cause of detainer was the warrant of commitment annexed to the writ.

This commitment, dated the 12th of August, 1864, recited that Emily Munro was convicted before George Boomer, Esquire, police magistrate of the city of Toronto, for that she, on the 11th of August, 1864, was the keeper of a common disorderly bawdy house on Queen street, in said city; and it was therefore adjudged that she for such offence should be imprisoned in the common gaol for the county of the city aforesaid, and there be kept at hard labour for the space of six calendar months; and commanded the officers to whom it was directed to take the said Emily Munro, and her safely convey to the common gaol aforesaid, and there to deliver her to the keeper thereof, together with that precept; and the keeper of the said gaol was thereby commanded to receive the said Emily Munro into his custody in the said common gaol, there to imprison and keep her at hard labour for the space of six calendar months.

A writ of *certiorari* had also been issued, directed to the police magistrate of the city of Toronto, commanding him to return the conviction of the prisoner, with the information and depositions touching the same, to which he returned an information on oath against her, made by one James Hastings, (not described,) that the prisoner was the keeper of a well-known disorderly house on Queen street, in the city of Toronto, in which men and women were in the habit of assembling, and frequent the house for lewd purposes; and further, the following:—"James Hastings sworn, states that the prisoner Emily Munro is the keeper of a well known disorderly and bawdy house in Queen street. I executed a warrant last night in the house and arrested Munro," and others, three women, who were named, "all the parties being inmates of the said house and frequenters thereof. There were two men in the house with the women when I

arrested them." The conviction was also annexed, and the return stated these to be the conviction of Emily Munro, the information and depositions taken before him as police magistrate, together with all things touching the same.

The conviction was as follows :—

Province of Canada, } Be it remembered, that on the  
City of Toronto, to wit : } twelfth day of August, in the  
year of our Lord one thousand eight hundred and sixty-four,  
at the said city of Toronto, Emily Munro, of the said city,  
is convicted before the undersigned, police magistrate for the  
said city, upon complaint of James Hastings, S.M., for that  
she, said Emily Munro, did on the tenth day of August, in  
the year of our Lord 1864, at the said city of Toronto, keep  
a common disorderly bawdy house on Queen street, in said  
city, a place of resort for both men and women of lewd character,  
for the purposes of prostitution, contrary to the statute  
made and provided in such case. I adjudge the said Emily  
Munro for her said offence to be imprisoned in the common  
gaol of the said city of Toronto, and there be kept at hard  
labour for the space of six calendar months. Given under  
my hand and seal the day and year first above mentioned,  
at Toronto, aforesaid.

(Signed,) GEORGE BOOMER, P.M. [L.S.]

These returns to the *habeas corpus* and *certiorari* having been read and filed, *M. C. Cameron*, Q. C., moved to discharge the prisoner.

1. The commitment is bad, because it does not follow the conviction as to the time of committing the offence. The conviction shews it to have been on the 10th, and the commitment on the 11th of August.

2. The commitment charges the prisoner with being the keeper of a common disorderly bawdy-house, while in the conviction the charge is that she did keep a common disorderly bawdy-house.

3. No jurisdiction is shewn on the face of the commitment, for it does not appear in terms that the offence was committed within the police limits of the city of Toronto. Sec. 14 of Consol. Stats. C., ch. 105, gives jurisdiction "in the case of any person charged within the police limits of any city." It may be said that the police limits and the city limits are co-extensive, but this being an inferior tribunal, the court



will not take judicial cognizance that they are so, in order to give jurisdiction. [DRAPER, C. J.—Why are we to assume that the city and police limits are not identical, in order to oust jurisdiction?] Sander's case, 1 Saund. 262, shews the force of this objection, and Deybel's case, 4 B. & Al. 246, and Souden's case, Ib. 294, go to shew that the court will not judicially notice position or limits.

4. There is nothing to shew that the prisoner was charged—*i.e.*, charged as the statute requires, namely, put upon her trial, and asked whether she was guilty or not guilty—nor whether she pleaded to the charge or confessed it.

The jurisdiction is given by Consol. Stat. C. ch. 105, sec. 1, which enacts that where any person is charged before the recorder of any city (sub-sec. 7) "with keeping, or being an inmate or habitual frequenter of any disorderly house, house of ill-fame, or bawdy-house," such recorder may hear and determine the charge in a summary way, and sec. 30 gives the same power to the police magistrate for any city, sitting in open court. Section 14 makes the jurisdiction in cases under sec. 1, sub-sec. 7, absolute, not dependent on the consent of the party charged to be tried by the magistrate. By sec. 16, in such cases, if the magistrate finds the charge proved, he may convict the person charged, and may commit to gaol for six months with or without hard labor; and by sec. 17 the form of conviction given at the end of the act is, in such cases, to be altered by omitting the words stating the consent of the party to be tried before the magistrate. In framing a conviction for this offence, it is necessary to make it appear on the face of it that the party was charged, whether he pleaded guilty or not guilty, and the result.

5. The conviction is not sustained by the information. The information is that defendant was the keeper of a disorderly house. The magistrate, therefore, had no authority to convict for keeping a common disorderly bawdy-house; and the cause of conviction is uncertain.

6. It appears on affidavit here that the magistrate had no jurisdiction, for the requirements of the 25th section of the statute were not complied with. That clause enacts that

“every recorder’s court for the purposes of this act shall be an open public court, and a written or printed notice of the day and hour for holding such court shall be posted or affixed by the clerk of the said court upon the outside of some conspicuous part of the building or place where the same is held.” The effect of sec. 30 is to extend this provision to the police magistrate sitting in open court. It may be urged that the clause is directory only, but this is an inferior tribunal assuming to act summarily, which it cannot do without complying with all that the act giving it jurisdiction requires. The necessity for shewing that this is more than a court of an ordinary justice of the peace is that usually it is only that, as appears by Consol. Stat. U. C. ch. 54, sec. 369, which enacts that the police magistrate, or in his absence the mayor, or any justice of the peace having jurisdiction in the city, shall attend at the police office daily, “for the disposal of the business brought before him as a justice of the peace.” If as a police magistrate he has more power, it should appear that he is assuming to act in that capacity, and to constitute it an open court, under sec. 25, it must be shewn that the necessary formalities were observed. In justice, too, this is requisite, and the objection is not merely technical, for a person might make no defence if he supposed the result of the enquiry could be only to commit him for trial, though he would take a very different course if he were aware that he might be convicted and punished; and it should be brought to his attention, therefore, what the court or tribunal really is.

7. The evidence, it is submitted, is unsatisfactory and insufficient.

8. The conviction states no offence with certainty. “A disorderly house,” by itself, has no signification. This statute does not make it an offence to keep a disorderly or bawdy-house, or define what they shall be, and the conviction, therefore, should have shewn what was done by defendant to give the house that character, and constitute the offence. Burn’s Justice, vol. ii., p. 248, ed. 1845, shews what in England is a disorderly house.

Sec. 29 of ch. 105, already referred to, enacts that “no

conviction, sentence, or proceeding under this act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same;" but this cures only formal defects, and if any want of jurisdiction is apparent, it will not help.

The following cases shew that jurisdiction must appear on the face of the proceedings:—*In re Peerless*, 1 Q. B. 143; *Hollingworth v. Palmer*, 4 Ex. 267; *The Queen v. Inhabitants of Totness*, 11 Q. B. 80; *Kite and Lane's case*, 1 B. & C. 101; *Fletcher v. Calthrop*, 6 Q. B. 880; *In re Turner*, 9 Q. B. 80; *The Queen v. Inhabitants of Watford*, Ib. 629; *The Queen v. Brown*, 4 U. C. R. 147; *Wilson v. Graybiel*, 5 U. C. R. 227; *The King v. Ferguson*, 3 O. S. 220; *The Queen v. Haystead*, 7 U. C. R. 9.

Mr. *Cameron* also tendered the affidavits of the prisoner, and of the three females arrested with her. The court allowed them to be read, to see if they were properly admissible, reserving this question until they should dispose of the application generally.

*S. Richards*, Q. C., for the crown. The conviction has not been properly removed here, for the six days' notice required by 13 Geo. II., ch. 18, have not been given to the magistrate. [*M. C. Cameron*.—That is necessary only when the removal is for the purpose of quashing.] The court cannot go behind the warrant. Here the warrant is good on its face, and the objections urged are grounds for quashing the conviction, not for this application. The warrant is not defective, for it is not necessary that it should appear that the party was charged, only that he was convicted, and if it shews an offence over which the magistrate had jurisdiction, that is sufficient as against this application. Consol. Stat. C. ch. 105, sec. 1, says nothing about the information or charge being on oath, and sec. 2 tends to shew that it need not be, for the charge may be reduced into writing while the party is before the recorder. There is nothing in the form of the conviction given by the act as to whether the party



was asked whether guilty or not; and this is an attempt to strike at something behind the conviction, which may be disposed of on an application to quash.

As to the police limits mentioned in sec. 14, they are the same as the city limits. The Municipal Institutions Act, secs. 265, 267, 393, 398, and 401, bear upon this point, as well as the 24 Vic., ch. 53, separating the city from the counties of York and Peel; and the court will not intend any difference between them.

As to the use of the word "disorderly," the Municipal Act, sec. 264, shews that an innkeeper may be convicted "of having a riotous or disorderly house."

Then as to the evidence here, [HAGARTY, J.—On this application, have we any right to discuss the sufficiency of the evidence, and whether the party was properly brought before the magistrate in the first instance. Perhaps we may, in order to shew want of jurisdiction altogether; that may be shewn by affidavit; but here it is clear from the statute that the magistrate had jurisdiction over the offence. Can we discuss, for example, the sufficiency of Serjeant-Major Hastings' evidence; in fact go into the merits, for that is the result of it? DRAPER, C. J.—If so, we are virtually sitting in appeal from the magistrate. *M. C. Cameron*.—I have taken it for granted that the court have this power, for if not, a writ of *habeas corpus* gives no redress. DRAPER C. J.—The writ, it must be remembered, was originally intended to prevent persons from being kept in gaol without trial. *M. C. Cameron*.—Yes, but there was no such thing then as the summary jurisdiction of magistrates. *Robert A. Harrison, amicus curiæ*, referred to *In re Smith*, 3 H. & N. 227, as shewing that affidavits might be received to shew that the magistrate took no evidence.] It is contended for the crown that the court cannot examine the evidence with any view to the merits, and there can be no other object in referring to it in this case.

The prisoner was ordered to be remanded until the first day appointed for giving judgments, September 19th, when

DRAPER, C. J., delivered the judgment of the court.

This application is only for the prisoner's discharge. Although a writ of *certiorari* was issued to return the conviction, &c., (perhaps improvidently, as there is a conviction, not a committal for trial, and it does not appear the requirements of 13 Geo. II., ch. 18, sec. 5, were complied with,) there is no application to quash the conviction. The conviction is also before us through a sworn copy, together with the information and depositions.

The return shews that the prisoner is in custody undergoing a sentence.

The first objection fails unless we can go behind the return and the commitment which it sets forth. If we can, there is no doubt but that the day stated in the commitment is erroneous, and should be the 10th of August, as the conviction states; but we think it a variance not material to the merits of the charge. If the magistrate were sued for false imprisonment and set up this conviction, I cannot bring myself to think that this variance would place him in the situation of having committed the prisoner without having convicted her of the offence for which she is committed.

As to the second objection, that in the commitment it is stated the prisoner "was the keeper of," &c., and in the conviction, "that she did keep," &c., the same question as to going behind the commitment arises; but it is to our mind a trifling play upon words. Both commitment and conviction differ from the statute, which designates the offence as "keeping any disorderly house," &c. The three different expressions all convey one idea. The person who keeps the house is the keeper, and a party cannot be truly charged with keeping unless she did keep.

We think there is as little weight in the third objection. The commitment begins with a venue, "Province of Canada, City of Toronto, to wit," and states that the prisoner was convicted of being the keeper of a common disorderly bawdy house "on Queen street, in said city." The 14th section of ch. 105, Consol. Stat. C. is as follows:—"The jurisdiction of the recorder in the case of any person charged within the police limits of any city in this province with therein keeping," &c., any disorderly house, &c., shall be absolute, and

shall not depend on the consent of the party to be so tried. The second section had made a different provision as to consent, covering all the cases mentioned in the first. Then the 30th section extends to the police magistrate sitting in open court the powers given to the recorder, and all the provisions of the act relating to recorder and recorders' courts.

Upon this it is argued that it does not appear in terms that the offence was committed within the police limits of the city of Toronto. The same objection was urged to me when this prisoner was before me on a *habeas corpus* at chambers, and I could not discover the force of it, but it has been seriously renewed. The very next section of the act (15) throws light upon the use of the expression "police limits." It speaks of the city of Quebec "as limited for the purposes of the police ordinance," and of the city of Montreal "as so limited," suggesting a difference between the limits assigned by the police ordinance and for police purposes and some other limits otherwise recognized or created. But with regard to the city of Toronto, its limits were assigned by statute; and the Municipal Institutions Act, which creates the police court and magistrate and the whole body of police, contains not a word indicating any police limits other than those of the city as already established, or justifying even a surmise that there are any police limits differing from the city limits.

The fourth objection may or may not be available if it exists in the conviction, but unless the commitment must contain all that the conviction does or ought to contain, it is unnecessary to state the information in it, and the more especially, as by the form given by the statute it does not appear necessary that the information should be set out in the conviction.

The fifth objection is of no greater moment, as no authority that we have seen renders a commitment void on the face of it, because of a variance between the original information and the conviction made after hearing evidence. If the prisoner had been charged with the information, and on being called on to answer had confessed the information, and then had been convicted of matter not contained in the



information, we have no doubt the conviction could be quashed, but in that case, while the conviction stood unreversed, it would warrant a commitment following its terms.

The sixth objection we also consider quite untenable. We do not think, admitting the provision to apply, as to which we say nothing, that it is open to the prisoner, for the jurisdiction of the police magistrate could not, in the absence of express enactment, be made to depend on the omission of his clerk to put up a written or printed notice outside the building in which the police court was held, that the court, which may be held every day, will on each day or every day meet at some particular place to exercise this summary jurisdiction.

The seventh objection is equally untenable. The court never, as we understand, on a *Habeas Corpus* to which a proper commitment in execution is returned, enter into the question whether the magistrate has drawn the right conclusion from the evidence, when there was evidence. In *Cave v. Mountain*, (1 M. & G. 257,) it was said, "If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation."

We will merely add that, though numerous cases establish that affidavits are receivable upon the question whether the magistrate had jurisdiction or no, they are not receivable, as far as we can discover from the authorities, to sustain objections as to the conduct of the magistrate in dealing with the case before him, when the case comes before the court as this does. A magistrate may furnish ground for a criminal information against himself, where he strictly frames his warrant to commit according to approved legal form.

As to the last objection, the commitment states that the prisoner was convicted of keeping a common disorderly bawdy house. There is no difficulty as to the legal meaning of the last two words, and the house will not be the less a public nuisance because it is found to be disorderly as well as a bawdy house. It is in law disorderly if it be a bawdy house. If the objection states truly that there is no such

offence known to the law of this province as the keeping a disorderly house, the term becomes mere surplusage, and cannot vitiate an otherwise sufficient statement; but in truth the statute already set out gives jurisdiction over persons charged with the keeping, &c., any *disorderly house*, house of ill fame, or bawdy house. The case of *Rex v. Higginson*, (2 Burr. 1232,) is also expressly in point. An indictment for keeping a disorderly house, *eo nomine*, where evil disposed persons came together and remained, cock-fighting, boxing, playing at cudgels and misbehaving themselves, to the common nuisance, &c., was held good at common law.

In our opinion the prisoner is not entitled to be discharged on any of the objections taken.

Prisoner remanded.

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IN RE JOHN McLAY, JOHN ROBINSON, AND DONALD ROBINSON.

*Mandamus—Fraudulent use of—Attachment—Practice.*

The affidavits stated that M., who claimed the office of registrar, obtained a mandamus *nisi*, directed to H., to deliver up to him the books and papers: that he went to the office with two constables, in H.'s absence, and demanded them of his wife, reading what purported to be a *peremptory* mandamus as his authority, but refusing to allow her or her solicitor to examine it; and that they then took away the books, &c.

Upon these affidavits the court granted a rule *nisi* for an attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud.

A rule for an order on M. to restore the books, &c., thus obtained, was refused, as H. might bring trespass, claiming a mandamus in the action; and where full redress can be had by an ordinary suit, applications for summary remedies should not be encouraged.

A writ of replevin had previously been refused.

*Robert A. Harrison* moved for a rule to shew cause why an attachment should not issue against the three parties named, for contempt and abuse of the process of the court, in this, that under color of a mandamus *nisi*, by representing the same to Frances Portia Hammond, and others, to be a peremptory mandamus, authorising them to take certain registry books and papers out of the possession of Nathaniel Hammond, they, or some or one of them, fraudulently obtained possession of the said books, &c., they, or

some or one of them, well knowing the writ was not what it was represented to be ; and so, by abuse of the process, committed fraud and deceit :—

Or for a rule or order on John McLay, to restore the possession of the books and papers so obtained.

The affidavits shewed that on or about the 21st of June, 1864, the two Robinsons came into the registry office, Nathaniel Hammond being absent, and asked Mrs. Hammond if she could register a deed, and then McLay came in and ordered the Robinsons, who were constables, to take away those books. On the authority for this being demanded by Mrs. Hammond, and soon after in her presence by Hammond's solicitor, McLay said he had a mandamus commanding Hammond to deliver the books, &c., relating to the registry office of the county of Bruce to him. Mrs. Hammond and her solicitor demanded to see the writ, but he refused peremptorily to produce it, but told them to stand on one side while he would read it. Then he read, or pretended to read, what purported to be an absolute writ of mandamus, issued out of this court, commanding the delivery to him by Hammond of the said books, &c. He refused to allow the solicitor to examine the alleged writ, but shewed him the seal of this court attached thereto, and in reply to an enquiry said that he had forwarded affidavits to the court, to the effect that Hammond was out of the province, and was avoiding service of a rule on him, whereupon the court granted him a rule absolute ; and they took away the books, &c., against Mrs. Hammond's will : that the court was applied to in Easter Term last for a peremptory writ of mandamus, which was refused, but a mandamus *nisi* was ordered and issued. It did not appear to have been returned.

DRAPER, C. J.—We think the first branch of the motion should be granted for a rule on McLay. As to the other two parties, there is nothing to shew that they were not acting honestly on the statements and representations of McLay as to the nature of the writ in his possession. There is probably enough shewn to make them trespassers with



him, but to make them parties in a contempt of process of the court neither addressed to them nor in their custody or possession, it should, we think, appear that they knew the truth, and concurring in the alleged false representation helped to take away the books.

As to the second part of the motion, we think it should be refused. An order for a writ of replevin was refused, because it appeared that though Hammond had been duly appointed registrar, yet McLay had a commission under the great seal of a later date, and it would be wrong to change the possession of books, &c., of this description, by taking them from a person who *primâ facie* at least had a legal right to them until that right was decided. We do not think we should assume by a summary proceeding to dispose of the same question. I should think that trespass would lie for this taking the books, &c., if it be illegal, and if Hammond had, at the time they were taken, a right to the possession of them; and the plaintiff might in such action claim a writ of mandamus, under Consol. Stat. U. C. ch. 23, sec 1. The right to the books might be tried in this form, involving the question of the right to the office, after which the writ of mandamus would be granted or refused, according to the result. We should not encourage applications for summary remedies, without trial by jury, where a full remedy can be had by the ordinary course of a suit at law.

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IN RE HAMMOND AND McLAY.

*Quo warranto.*

A *quo warranto* information was refused to try the right to the office of Registrar, and the applicant left to his action for the fees against the alleged intruder.

*Robert A. Harrison* moved for a rule, calling upon John McLay to shew by what authority he claimed to be registrar of deeds in and for the county of Bruce.

*Cur. Adv. Vult.*

The court, upon a subsequent day, refused the rule.

The following memorandum of authorities, &c., prepared

by the Chief Justice, though not read as a judgment, has been handed to the reporter.

There must be a user as well as a claim of a franchise before the court will grant an information. *Rex v. Whitwell*, 5 T. R. 85; *Regina v. Pepper*, 7 A. & E. 745; *Rex v. Ponsonby*, Say. 245; *Rex v. Tate*, 4 East 337, shews that a swearing in, though defective, whereby defendant claimed at the time to be a free burgess of a corporation, was a sufficient user, and not like a mere claim of the office.

In *Rex v. Bingham*, 2 East 308, the defendant, a bailiff, had a discretionary power in the selection of jurors, and there were no fees attached to his office, so that the question could not be tried in an action for money had and received.

This case cannot come within the statute 9 Anne, ch. 20, for the office is not a franchise in a borough or a corporation. It is within the act 4 & 5 W. & M. ch. 18, which act extends to informations in the nature of *quo warranto*, to try the right of usurping on public franchises? See *Rex v. Howell*, Ca. temp. Hardw. 247.

This is a ministerial office, and may be granted *durante*. See Stat. 24 Geo. II., ch. 48; 4 Co. 33 *a*; *Dyer* 176, pl. 28; 9 Co. 97; 1 Bl. Com. 335-6, 4 Inst. 165; 1 Ld. Raym. 32; 2 Ld. Raym. 1030.

The affidavit of the relator discloses that he claims to be the person lawfully entitled to the office, and that McLay has usurped it. We know that by statute there are fees of office, and if the relator is really entitled to the office, as he insists, he may bring an action against the alleged intruder for such fees. In this mode he may effectually try the right to the office. *Arris v. Stukely*, 2 Mod. 260; *Hussey v. Fiddall*, 12 Mod. 324; *Bonnel v. Foulke*, 2 Sid. 4. And see *Howard v. Wood*, 2 Show. 22, 2 Lev. 245, 2 Jon. 216, *Sir T. Jones*, 126; *Comb.* 447.

As to the statute, Consol. Stat. U. C. ch. 89, sec. 10, authorises the filling up a vacancy in the office of registrar occasioned by the "removal," as well as the death, resignation, or forfeiture of office.

Section 66 enacts that the governor may, in his discretion, remove the registrar if he does not keep his office in the place appointed, or neglects or refuses to move to an appointed place, where he has no fire-proof office or vaults, or ceases to reside in the county, or becomes wholly incapable of discharging his duties, and if the grand jury present this.

Secs. 73 and 77 provide for forfeiture in certain cases.

We think the better course not to grant this rule, but to leave the applicant to an action. It may thus be carried to the court of appeal beyond doubt.

Rule refused.

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### HAMILTON V. GOULD.

#### *Description of land—Commencement on a stream—Effect of.*

Where land is described as commencing at the intersection of a road allowance by a stream, and the boundary lines at once diverge from the stream on either course, *Quære*, where is the point of commencement—in the middle of the stream or on the bank? and what are the owner's rights as regards the water?

This question was discussed but not decided, as the plaintiff failed to shew that any part of his land came to the stream.

The declaration alleged that the plaintiff was possessed of certain land in the township of Uxbridge, being part of lot 31, in the sixth concession, and was entitled to the flow of a stream or water course to and through the said land; and the defendant obstructed and diverted the water of the said stream from the said land, and prevented the same from flowing in its usual flow, current, and quantity, to the said land, to the great damage of the plaintiff.

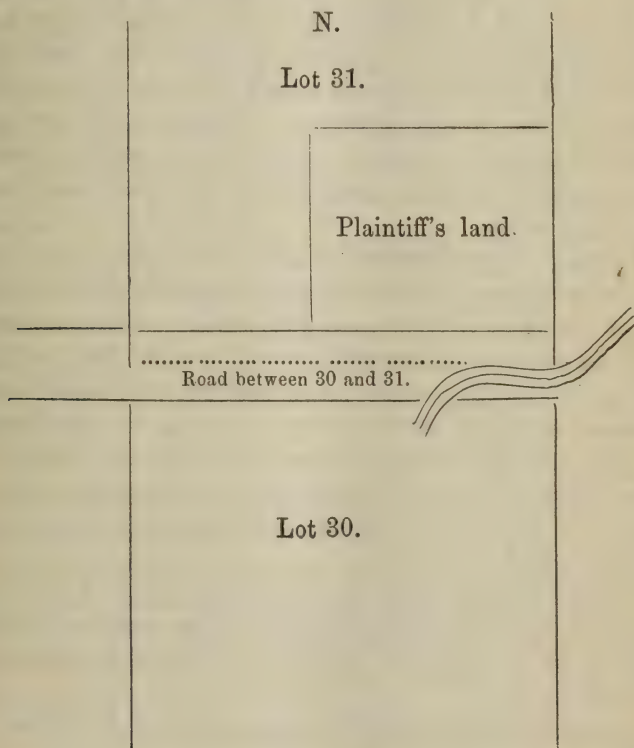
*Pleas.*—1. Not guilty. 2. That the plaintiff was not possessed of the said land as alleged. 3. That the plaintiff was not entitled to the flow of the said stream to and through the said land as alleged.

The defendant had conveyed the land now owned by the plaintiff to persons named McCallum. The deed described the land as part of lot 31, and as commencing where a post had been planted at the intersection of the northern limit



of the road allowance between lots numbers 30 and 31, in the sixth concession of the township of Uxbridge, by the creek known as Jesse Gould's creek; thence south  $74^{\circ}$  west, 2 chains 94 links, extending at right angles to said course northerly to the depth of 2 chains and 50 links. The McCallums afterwards conveyed to the plaintiff.

The following sketch shews the position of the land in question, the dotted line marking the southern boundary for which the plaintiff contended:



At the trial, at Whitby, before *Richards*, C. J., one of McCallums swore that the land was fenced by them before they got the deed: that he saw the post referred to, which was planted by his brother, a surveyor, (the other grantee:) that that point was two or three feet in the water, and they put the angle of their fence at that post, and for the first ten posts the creek went

inside the fence, and then went off the lot: that before defendant would give the deed he said he wanted the lot surveyed, and he got Shier, a surveyor, to survey it, who planted a post at what he called the corner, which was about sixteen feet north of what the witness called their line: that he measured the lot, and put stakes: that all this was done before defendant would give a deed. The witness and his brother, who were then building their fence, then objected to the deed as first written, containing the words "according to the survey of John Shier, P. L. S." These words he said were scratched out before the deed was executed. They objected because Shier's survey cut them off from the creek, and they so told defendant. Witness could not say defendant agreed they should have the creek, but he allowed the words to be struck out, and to take the deed according to its legal effect.

Another witness proved digging the post holes for McCallum's fence. They were dug in the bed of the creek.

For the defence, Shier proved his survey. In September, 1855, he surveyed the road allowance. At this lot he made the north boundary of the road sixteen and a-half feet further north than the fence then standing, and the land, accords with the description in the deed, and does not come within fourteen or fifteen feet of the stream. No part of 31 at that point touched the stream, nor in front of plaintiff's land.

Mr. Shier added that if he were asked to plant a post at the north limit of the road allowance at the creek, he would plant it at the centre of the creek; he would wait further directions.

Another surveyor, Mr. Hanning, confirmed Mr. Shier's survey.

The learned Chief Justice directed a verdict for defendant, with leave to the plaintiff to move to enter a verdict for him for 1s., if the court should be of opinion that under these facts and the description, the plaintiff was entitled to recover.

*M. C. Cameron*, Q. C., obtained a rule *nisi* accordingly, to which *Richards*, Q. C., shewed cause.

HAGARTY, J.—It may not be unprofitable to consider the state of the law, if the plaintiff established that the angle of his lot extended to the bank, or actually to the water.

In *Mason v. Hill*, (3 B. & Ad. 312,) Lord *Tenterden* quotes from what he calls the perspicuous and comprehensive language of *Leach*, V. C., in *Wright v. Howard*, (1 Sim. & St. 190.) “*Primâ facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water.”

In *Embrey v. Owen*, (6 Ex. 364,) the court, in giving judgment, quotes largely from Mr. Justice *Story's* words, and *Kent's Commentaries*:—“Though the proprietor may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.” *Parke*, B., says, “The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes, \* \* \* all may reasonably use it who have a right of access to it, \* \* \* each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.”

*Pollock*, C. B., in *Wood v. Waud*, (3 Ex. 775,) says, “When property was established each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him; the property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it.”

In *Chasemore v. Richards*, (5 Jur. N. S. 875,) Lord *Chelmsford* says, “The right to the flow of water in streams and rivers in the natural state is incident to the property through which it passes.”

In *Kent's Commentaries*, 6th ed. vol. iii., p. 428, the subject is largely discussed:—“Where a stream is used in a grant as a boundary or monument, it is used as an entirety to the centre of it, and to that extent the fee passes.”

In *Tyler v. Wilkinson*, (4 Mason, 400,) *Story*, J., in his



oft-quoted judgment says, "*Primâ facie* every proprietor upon each bank of a river is entitled to the land covered with water *in front of his bank*, to the middle thread of the stream, or, as it is commonly expressed, *usque filum aquæ*. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current," &c., &c.

The plaintiff claims in his declaration that he is entitled to the flow of a stream to and through his land, which right is traversed.

If I rightly understand the case, and as *Story*, J., puts it, the owner of the bank of the stream is entitled to the land covered with water in front of his bank to the middle thread of the stream, and thus acquires the right to the use of the water flowing over that portion of land.

If the plaintiff merely touch the stream where a line of road crosses it, and the lines (his parcel of land being bounded by right lines) at once diverge from the stream, not following its bank in either course, it is difficult to understand what right he has, according to Mr. Justice *Story's* definition. Has he any portion of the bank, so as to carry with it the ownership of any of the bed of the stream to its middle thread? If his point of intersection be carried out to the middle thread, his boundary lines must at once include land belonging to others.

A different result would follow our making the angle where the two right lines meet at the intersection of the creek and the north line of the road allowance, to be out in the middle of the stream, instead of upon its bank.

This might in many cases have an unexpected effect. In the case of a small parcel of land, three chains square, if the creek appeared just there to be six chains wide, a commencement at the "*medium filum aquæ*," would give nothing but land covered with water. Where there are two diverging boundary courses starting from the intersection of a stream with a fixed road line, it would seem as if the only way to avoid such a result would be to find the angle of commencement on the bank, and not in the centre of the stream. In the latter case the plaintiff would have no land in front of his bank, or, in other words, he has no tangible portion of

the bank. His land comes to an angle, an impalpable point on the bank, and there would be nothing to extend to the middle thread of the stream. The owners on either side of his lines would have the bank, and the right to the use of the water to its centre, to his exclusion. He would not be a riparian proprietor in this view.

It seems, however, unnecessary for the purposes of this suit to decide the general question, how far such a description, omitting all reference to an existing post, would require a starting from the centre of the stream, or from the verge of the bank.

The question seems one of fact. If Mr. Shier be right, and his post is the post to govern, then the plaintiff is not a riparian proprietor, and must fail.

I hardly understand how the case is before us—whether we are to draw inferences as a jury or not.

Looking at the two sketches produced, shewing respectively the contention of the parties, I understand that it is on his front line or southern boundary of his lot that the plaintiff claims to have the bank of the creek.

Defendant, Gould, owned lot 31, and sold this small piece to the McCallums, as part of 31, and Shier swears positively that the north boundary of the road allowance between 30 and 31 is some sixteen feet further north than where the plaintiff (who purchased from McCallum) claims the line to be. If Shier be right as a question of survey, independently of where the disputed post actually stood, then part of the land claimed by the plaintiff is on a public highway, namely, the road allowance. Defendant, Gould, only professed to sell part of 31, and to commence where a post had been planted at the intersection of the north limit of the road allowance between 30 and 31, by the creek known as Jesse Gould's creek.

I do not, therefore, see how any thing in that deed precludes him from shewing the true boundary of lot 31.

The plaintiff offers no evidence against Shier's accuracy, (confirmed as it was by another surveyor,) but rests altogether on the actual position of the fence.

It appears to me that the plaintiff fails to shew any legal

objection to the verdict, and that his rule must be discharged.

DRAPER, C. J.—I entirely agree in the conclusion.

According to the plans and evidence, the plaintiff claims a point of land as the starting point of the description or boundary of his lot, which is in reality in the allowance for road between lots Nos. 30 and 31, if the southern limit of this allowance for road is correctly ascertained and laid down by the two surveyors who gave evidence at the trial. Their evidence has not been impeached in this respect. Then as the right to the uninterrupted flow of the water is claimed exclusively on the ground that the plaintiff owns part of No. 31, if the portion of land with regard to which his claim arises is no part of that lot, his action fails; and according to the evidence, that portion or point of land is on the public allowance for road.

MORRISON, J., concurred.

Rule discharged.

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SOMERS V. LIVINGSTON ET AL.

*Appeal.*

Where, in a case of collision, the judge of the county court reported that he thought he had not sufficiently directed the jury to the rule laid down in *Tuff v. Warman*, 5 C. B. N. S. 573, as to the effect of negligence on the plaintiff's part, and that he had therefore granted a new trial, this court on appeal refused to interfere.

APPEAL from the County Court of York and Peel.

*Read*, Q. C., *Moore* with him, for the appellant.

*M. C. Cameron*, Q. C., contra.

The facts of the case are sufficiently stated in the judgment of the court, delivered by

HAGARTY, J.—This is a case of collision of vehicles.

The plaintiff established a case proper to be submitted to the jury. The defendants' witnesses gave very material

evidence of declarations by the plaintiff as to his horses shying, and also of the respective paces at which the vehicles were travelling, and the case on the opposing evidence was one manifestly requiring that the attention of the jury should be directed to the excellent rules laid down in *Tuff v. Warman*, (5 C. B. N. S. 573.)

We do not accede to the appellant's argument, that because the evidence might shew that defendant was violating the provisions of the act respecting travelling on highways, (Consol Stats. U. C. ch. 56,) it was not necessary for the judge to direct the jury to these well-known rules. The law is too clear on this head to require the citation of cases.

The learned judge reports to us that he does not think he sufficiently directed the jury to these matters, and that in his judgment there should therefore be a new trial.<sup>(a)</sup>

It would, we think, be an exercise of power as unusual as unwise to allow an appeal from such a decision, based on such a review of the learned judge's own direction to the jury.

We see no ground whatever for our interference, and think the appeal must be dismissed with costs.

Appeal dismissed.

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During this term the following gentlemen were called to the bar:—THE HONORABLE MICHAEL HAMILTON FOLEY, EDWARD JAMES DENROCHE, THOMAS FERRIS NELLIS, GEORGE BOYS NICOL, WILLIAM LAIDLAW, JAMES FREDERICK DENNISTOUN, JOHN COYNE, JOHN IDINGTON, LYMAN ENGLISH, JOHN EDWIN FAREWELL, BEVERLY JONES, GEORGE MOUNTAIN EVANS, HENRY HAMILTON LOUCKS, WALTER JOHN HAYWARD, WILLIAM WILBERFORCE HAMILTON.

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(a) The learned judge in his report gave no particular account of his charge. The jury had found for the plaintiff, \$125 damages. On the second trial the verdict was for \$60.



## MICHAELMAS TERM, 28 VICTORIA, 1864.

*(November 21st to December 3rd.)*

THE HONORABLE WILLIAM HENRY DRAPER, C. B., C. J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

IN THE MATTER OF DAVIDSON, SHERIFF OF, AND MILLER,  
CHAIRMAN OF THE QUARTER SESSIONS FOR, THE COUNTY  
OF WATERLOO.*Jury Act, Consol. Stat. U. C., ch. 31—Sheriff's fees—Mandamus—Demand  
and refusal—Quarter Sessions—Order on treasurer, how to be drawn.*

Where the sheriff travels to summon grand and petit jurors at the same time, and serves both during the same journey, he is not entitled (under Consol. Stat. U. C., ch. 31,) to charge separate mileage on each set of summonses, but only for the number of miles actually travelled in order to serve all the jurors.

He is entitled, under sec. 161, sub-sec. 3, besides his mileage, to \$12 for summoning the 48 petit jurors for the County Court, and the same sum for the Quarter Sessions, though the same jurors are summoned for both courts, and served at the same time with both summonses.

On application for a mandamus to the chairman of the Quarter Sessions to sign an order on the treasurer for payment of the sheriff's account which had been audited and passed, the chairman stated, in his affidavit filed on shewing cause, that he declined to mark the account as audited and passed, and said that he would not sign a check therefor. *Held*, that this removed all objection to the proof of a demand and refusal.

*Seemle*, that such a mandamus could not properly be granted, for, 1, it is not essential that an order of the Quarter Sessions should be signed by the chairman; and, 2, he has no right to draw orders on the treasurer except when presiding in court, and then it is an order of the court, not of the presiding justice.

The introduction in the affidavits of both sheriff and chairman of remarks impugning each other's motives and conduct, strongly disapproved of.

In Easter Term last *Robert A. Harrison* obtained a rule calling on Mr. Miller, chairman, &c, to shew cause why a rule or order of this court should not issue, directing him to sign an order for the sum of \$148.60,

being the amount of an account of the said sheriff audited and passed by the court of Quarter Sessions in March last; or why a writ of mandamus should not issue commanding the said chairman to sign such order; and why such order as to the costs of this application, and of subsequent proceedings, should not be made as to this court should seem meet.

By the affidavits filed on both sides, it appeared that the sheriff's account, amounting to \$148.60, was presented on the 10th of March, 1864, to the Court of Quarter Sessions for the County of Waterloo, and the majority of justices present audited and passed the same, there being a difference of opinion as to two items, which were submitted to vote.

It seemed to be the practice, when an account had been audited and passed, for the chairman of the Quarter Sessions to mark it accordingly, and for the chairman also to sign a check or order upon the treasurer to pay the amount. The chairman stated in his affidavit that he declined to mark and indorse this account as audited and passed, and stated that he could not sign a check for the amount, though he was willing to sign one for the same less two items to which he objected as not warranted by law.

A check was however presented to the chairman for his signature in the following form:

"Quarter Sessions, Berlin, March 10th, 1864. Pay to the order of George Davidson Esq., Sheriff, one hundred and forty-eight  $\frac{60}{100}$  dollars.

To the treasurer County of Waterloo.

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Chairman."

The principal matter in dispute, and on which the refusal of the chairman was mainly grounded, was the right of the sheriff to charge separate mileage for travelling to serve grand jurors and petit jurors, when he travelled to serve both sets of summonses at one and the same time, and the two were served in the course of the same journey. There was a separate precept for summoning grand and petit jurors.

The other item to the allowance of which the chairman objected, arose out of these facts:—The sheriff has a right

to charge a sum of \$12 for summoning the panel of 48 petit jurors, exclusive of his mileage. (a) He summons the same forty-eight persons to serve as petit jurors for the Court of Quarter Sessions and for the County Court, both courts opening at the same place and on the same day, and both being almost always presided over by the same individual, the judge of the County Court. There are separate summonses served on each juror for each court, though in practice served at the same time. The jurisdiction of one court is criminal, of the other civil. Though held in the same court room and at the same time, they are as distinct as the courts of *Nisi Prius* are from those of *Oyer* and *Terminer* and General Gaol Delivery. The judge sits alone in the exercise of his civil jurisdiction, but he must have at least one other justice of the peace to sit with him in the Court of Quarter Sessions, and for the passing and audit of accounts he must have six to sit with him. The sheriff charged \$12 for summoning 48 petit jurors for the Quarter Sessions and the same sum for summoning 48 jurors for the County Court.

*S. Richards*, Q. C., shewed cause, citing "*The Upper Canada Jurors' Act*," Consol. Stats. U. C. ch. 31, secs. 59, 69, 145, 161, 164; ch. 119, sec. 7; ch. 121, secs. 3, 4; *The Corporation of Haldimand v. Martin*, 19 U. C. R. 182; *In re Keenahan and Preston*, 21 U. C. R. 461; *Davidson and The Quarter Sessions of Waterloo*, 22 U. C. R. 405; *Regina v. Conyers*, 8 Q. B. 999; *Rex v. Robinson*, 2 Smith, 274; *Regina v. Justices of Middlesex*, 12 L. J. N. S. 36, M. C.; *In re Hamilton, Sheriff, v. Harris*, 1 U. C. R. 513.

*M. C. Cameron*, Q. C., and *Harrison* supported the rule, citing *Regina v. Law*, 7 E. & B. 366; *The Queen v. The Board of Police of Niagara*, 4 U. C. R. 141; *Ex parte Bird*, 5 Jur. N. S. 1009.

DRAPER, C. J.—It has been urged against this rule, first, that no sufficient demand is shewn to have been made upon the chairman to sign the check or order in question, so as to

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(a) Under Consol, Stat. U. C., ch. 31, sec. 161, sub-sec. 3.

give the sheriff a right to claim the writ of mandamus. And, second, that the law does not impose a duty on the chairman of the Quarter Sessions to sign a check for the payment of money by the treasurer of the county, or at all events not such a check as is set forth in this case, which is on the face of it a mere negotiable draft at sight.

Independently of these objections, the case has been argued on both sides on the right of the sheriff to be paid both or either of the sums in dispute, and it is in my opinion better to express such conclusion as we have arrived at on the substantial matter in dispute, whatever view we may take of the preliminary difficulties.

After examining the clauses of the statutes to which reference has been made, and after carefully considering the opinions expressed in the case of *The Corporation of Haldimand v. Martin*, (19 U. C. R. 178,) I am of opinion that notwithstanding that there are two precepts, the one directing the sheriff to summon a grand and the other a petit jury, yet the plain intent of the statute is, that for summoning *all* the jurors required for any particular court the officer summoning shall only be entitled to mileage for the number of miles actually travelled. The officer is to be paid out of public funds a sum per mile which has been settled to be a proper allowance for mere travel. Mileage must mean this, and I do not see that it can mean more. For summoning jurors, the allowance is carefully limited by the statute to travel necessarily performed in going to effect the service of such summonses, and in the language of Sir *J. Robinson*, (19 U. C. R., p. 183,) "All that any of the statutes had given was 6d. a mile for the distance necessarily travelled from the county town to make all the services. It was never allowed, I think, to charge from the county town to the residence of each juror, as if the sheriff had made a new start from the county town to go to the residence of each person, though eight or ten jurors might be living near each other in a township thirty miles from the court."

It does not appear to me that the principle is inapplicable because the officer is travelling to serve summonses on twenty-



four grand jurors at the same time that he is travelling to serve forty-eight petit jurors, all of whom are to attend at the same time and the same place for the transaction of business in the same court. When the service is completed he has a right to remuneration for every mile actually and necessarily travelled, but I fail to see why he should, after travelling ten miles and then serving a summons on a grand and another on a petit juror, be allowed to claim for travelling twenty miles; and this is the result of the contention.

The allowance for summoning the forty-eight petit jurors for the Quarter Sessions and County Court appears to me to rest on a different footing, and for the reasons given by Sir *John Beverley Robinson* in the same case in support of allowing two panels of jurors, one for each of these courts. First, the legislature has allowed one panel for each court; next, the offices of the two courts are different, "and in order to make the panels conveniently accessible to suitors, it probably is expedient that there should be one in the office of each court." Then it appears very clear to me that without the legislature had so provided, a summons to attend as a juror at the court of Quarter Sessions would not be a summons to attend at the County Court, nor would it subject a person so summoned to be fined for non-attendance at the latter court. As I understand, the jurors are distinctly summoned for each court, and a separate return of the jurors summoned is made to the precept issued by each court, and if required the sheriff must be prepared to shew that each juror was summoned to attend whichever court it may be in which such juror's attendance may happen to be required. It thus becomes, in my opinion, a distinct service, and may be charged for accordingly.

This expression of opinion will, I hope, put an end to the present difficulty.

Then as to the objection that there has been no sufficient demand shewn, the second paragraph of the chairman's affidavit in my opinion puts an end to it. He states that he declined to mark and indorse the sheriff's account, as "audited and passed," and stated that he would not "sign a check therefor." After this, the want of proof of a sufficient

demand ought not to be set up. I am quite prepared to overrule the objection.

My present leaning is in favor of the other objection, first, because it does not appear to me necessary for the validity of an order of the court of Quarter Sessions that its orders should be signed by the chairman; and, second, because, as a mere check or order of the chairman himself, he has not, that I am aware, any right to draw checks or orders upon the treasurer of the county, unless when sitting in court, and as presiding in court; and then the instrument is an order of the court itself, and not an order of the presiding justice.

The auditing and passing of the accounts is the act of the court itself. The endorsing a memorandum of such auditing and passing is no more than an authentication for the guidance of the clerk of the peace in entering the account and its audit in the record of the proceedings, and for drawing up an order of court, when such order is signified, that the treasurer do pay such an account. It seems to me analogous to the granting a rule *nisi* or absolute by any court of record. The court grant or refuse, discharge or make absolute, the rule asked for. The clerk makes the entry in his book, and issues the rule so ordered to the party entitled to it. The judge presiding signs nothing. But for the words in the 3rd section of chapter 121, Consol. Stat. U. C., I should have felt no doubt, and I am not disposed to construe them as meaning to enact that no order of the court of Quarter Sessions for the payment of money shall be obeyed unless a check or order for the payment of the sum be drawn and signed by the chairman. I should rather hold that the effect of this section is, that where the court of Quarter Sessions have established a practice for their own convenience, that a check or order must be signed by their chairman before an account approved and ordered by the court to be paid shall be liquidated by the treasurer, it must express the act of parliament by which the expenditure is sanctioned. I certainly do not think it was the intention of the legislature that after the court of Quarter Sessions have made a formal order, though erroneous or even illegal, the

chairman of that court should have power or authority to delay the execution of or to nullify such order, by withholding his signature. The superior courts can quash an order of Sessions for the payment or appropriation of money, (*Rex v. Justices of Newcastle*, *Dra. Rep.* 204,) and such a mode of proceeding is a more satisfactory mode of disposing of such a question as the present.

I cannot, however, properly withhold an expression of regret and disapproval at finding introduced into these affidavits other matters than those which were necessary to support or to answer the application to the court. It was no necessary part of the sheriff's case to assert his belief that the chairman's refusal was made "with a view to put him to much trouble and expense; that he has systematically attacked my accounts, and has made it his practice to canvass the magistrates for the purpose of getting them to support him in doing so, and when they failed to support him he has frequently scolded and insulted them." Nor was it necessary for the chairman to state that the sheriff "is in the habit of sending, without any authority whatever, for certain magistrates, to attend the said court of Quarter Sessions, who are known to be favorable to the passing of his accounts, and such magistrates attend and give their vote for the passing of the said accounts, although they contain improper and illegal items; and the magistrates who voted for the account in respect to which this application is made, were specially sent for by the said George Davidson, to be present at the auditing of the said account." And in the affidavit of the sheriff, offered by way of reply, in the fifth and longest paragraph the conduct of the chairman is attacked, and his motives impeached in reference to that part of his proceedings connected with the sheriff's accounts.

Both parties were wrong in suffering their feelings one towards the other to be mixed up with an application to this court for the enforcement of a legal right, and if the court felt that the matters so irregularly brought under their notice required any further notice or proceeding on their part, it might be that they would bring these crimina-



tions and recriminations under the notice of the government, who would have the power to apply some remedy if they found the administration of public justice injuriously affected.

In my opinion this rule must be discharged, and under the circumstances without costs.

HAGARTY, J.—I agree with the learned Chief Justice. Mileage, as I understand it, is a recompense to the sheriff for the expense and labour of the travel which he has to perform in serving the process of the court. It can hardly perhaps be called a fee; it seems rather an equivalent or reimbursement for toil or travel actually undergone. The Legislature has estimated the extent of the reimbursement. I think it must be actually, not constructively, earned.

I agree also as to the panels.

With reference to the remarks on the unseemly state of things disclosed in the affidavits filed, I have to notice that this is not the first time this court has been reluctantly compelled to comment on similar conduct.

Little over a year ago the same parties were brought before the court in another contest about sheriff's fees.

The judge who pronounced the judgment of the court felt bound to say as follows: "Assuming that the court of Quarter Sessions acts judicially in auditing these accounts, I must further express my regret at the production of affidavits from two of the functionaries there presiding, to aid an application against the decision of their co-adjutors."—(22 U. C. R. 409.)

The present case assumes a more aggravated form.

If members of a court of justice, not content with the expression of an honest difference of opinion, choose to file affidavits impugning the motives of their fellows, their attention ought to be called to the injurious effect of such a proceeding on the confidence with which their court should be regarded; and if called in vain, then it may be natural to look for the intervention of an authority capable of dealing successfully, if not with the evil itself, at least with those who contribute so persistently to its display and continuance.

It is obvious, however, that such charges of partizanship



amongst the magistracy may cause but little surprise, so long as the chief executive and the chief judicial officers of the county permit themselves to indulge in such accusations against each other.

I hope some remedy can be found, for the sake of the public interest.

MORRISON, J., concurred.

Rule discharged, without costs.

### MCDONELL ET AL. V. McDONALD.

*Sale for taxes under 13 & 14 Vic., ch. 67—Insufficient description of land sold—Other objections.*

Upon objections taken to defendant's title, depending upon a sale for taxes under the 13 & 14 Vic., ch 67,

1. The act, sec. 53, directs the sheriff to sell such part as he shall consider it most for the advantage of the owner to sell first, and sec. 57 enacts that the deed "shall describe the land by its situation, boundaries and quantity." The description in this deed was, "eighty-nine acres of the south part of the east half of lot number twenty-five, in the second concession of the township of Charlottenburgh." *Held*, insufficient, as containing no statement of boundaries.
2. *Held*, that the fact of there having been distress upon the land could make no difference.
3. The land was called in the collector's return the E.  $\frac{1}{2}$  25, 2nd con. Charlottenburgh, the word "front," before "2nd," being struck through with a pen, while in the warrant that word was written, and in the sheriff's deed it was omitted. *Held*, immaterial, for that the identity of the land sold with that on which the tax was to be collected was sufficiently proved.
4. *Held*, no objection that the collector was bound by the act to make his return on the 14th of December, but delayed till the 8th of April following—for that it was a matter between him and the municipal council, which could not prejudice the title; and as they received the return without objection, it might be assumed that they had appointed the 8th of April to make it on.
5. The east half appeared to have been assessed separately, and it was admitted that the whole of lot 25 had been granted together. *Held*, in the absence of any explanation, that it should be presumed the tax on the west half had been paid, and that it had therefore been properly assessed separately.
6. The want of proof of a certificate from the sheriff under sec. 54, was held unimportant.

EJECTMENT for lot number 25, in the second concession of the township of Charlottenburgh.

Defence limited to the south eighty-nine acres of the east half of the lot.

The case was tried at Cornwall, in November last, before *Richards, C. J.*

The collector's return for the year 1851 of taxes not collected was proved and put in by the defendant, who began, after admitting the plaintiff's *primâ facie* right to recover; and attached thereto was the affidavit of the collector, sworn as required by law, that he had not upon diligent enquiry been able to discover any goods or chattels belonging to or in possession of the parties therein charged with or liable to pay such sums, whereon he could levy the same.

In this return was the following entry :

"Supposed estate Yates McDonald, E.  $\frac{1}{2}$  25, 2nd, 9s. 2d. Non resident."

The treasurer proved that he notified the owners of lands contained in the return, when he could ascertain their residence, and that if the plaintiffs lived at the time with their mother in Cornwall, he was certain he mailed a notice to them. A list of the lands liable to be sold for taxes was duly published in the *Gazette* and in a local newspaper.

On the 24th of April, 1852, the treasurer issued a warrant for sale of the lands and delivered it to the sheriff. It included the east half of No. 25, 2nd concession, front of Charlottenburgh. The sheriff made a return to the treasurer of the lands sold, and the part of this lot which was sold was not redeemed.

It was admitted that the sheriff sold under this warrant the land defended for, and that the defendant became the purchaser.

The deed from the sheriff to the defendant was produced, and its execution admitted. It bore date the 6th of October, 1855. It recited the warrant from the treasurer and its receipt by the sheriff on the 26th of April, 1852: that the lands were duly advertised for sale, and that the following lands, "being parcel of the lands in the said warrant mentioned, and being so advertised, that is to say, eighty-nine acres of the south part of the east half of lot number twenty-five, in the second concession of the township of Char-

lottenburg" were, on the 5th of August, 1852, sold by the sheriff to the defendant to satisfy the rates and expenses, for eighteen shillings and eleven pence, and that the period of redemption had expired; and witnessed that in consideration, &c., the sheriff did grant, bargain and sell, to the defendant, his heirs and assigns forever, "the said parcel or tract of land heretofore mentioned and described." *Habendum* in fee. This deed was registered in 1856. It was further admitted that the sheriff did duly advertise.

The plaintiffs then offered to prove that there was distress on the premises in 1851 and 1852, and urged that the collector's duty was to make the rates and taxes by levy thereupon. The learned Chief Justice held that this would make no difference.

It was then objected that under the 41st and 42nd sections of 13 & 14 Vic., ch. 67 (the Assessment Act at that time in force) the collector was bound to make his return on the 14th of December, and he did not make it until the 8th of April following:

That the land was called in the collector's return the east half, 25, 2nd con., the word "front" being struck through with a pen: that in the warrant the word "front" was written, and in the sheriff's deed the word "front" was omitted:

That there was no evidence to explain why the east half was not assessed together with the west half, lot No. 25 having been, as was admitted, granted altogether by the Crown as a whole, and not as comprising two distinct halves or portions:

That it did not appear that the sheriff gave the purchaser a certificate pursuant to section 54 of the statute:

That the deed did not describe the land sold by boundaries, as required by section 57, and was uncertain as to what 89 acres were conveyed.

It was admitted that the concession in which this land lies is next behind the concession which fronts on the St. Lawrence.

The learned judge overruled all the objections, but reserved leave to the plaintiffs to move upon any of them,



except that relating to distress upon the lands, for leave to enter a verdict for the plaintiffs, the court to have power to draw inferences of fact as a jury might do, if it were necessary; and the jury then gave a verdict for defendant.

*M. C. Cameron*, Q. C., obtained a rule to shew cause why a verdict should not be entered for the plaintiff upon the leave reserved, or why there should not be a new trial, the verdict being contrary to law and evidence, and for misdirection, and the rejection of evidence, the misdirection being in telling the jury that the fact of there having been sufficient distress on the premises at the time the sheriff received the warrant for sale would not invalidate that sale; and for refusing to receive evidence that there was such distress.

*The defendant in person* shewed cause.

The following authorities were referred to :—*Doe Bell v. Reaumore*, 3 O. S. 243; *Doe Burnham v. Summonds*, 9 U. C. R. 436; *Fraser v. Mattice*, 9 U. C. R. 150; *Williams v. Taylor*, 13 C. P. 219; *Hall v. Hill*, 22 U. C. R. 578; *McDonald v. Robillard*, 23 U. C. R. 105; *Laughtenborough v. McLean*, 14 C. P. 175.

DRAPER, C. J., delivered the judgment of the court.

We agree with the learned Chief Justice on the question of distress. By the old statute of Upper Canada the warrant directed the sheriff to sell the lands, provided there were no distress thereon from which the taxes might be made; but if there were distress he was commanded to levy thereout. The 48th section of 13 & 14 Vic., ch. 67, directs the treasurer to issue a warrant commanding the sheriff to levy on the lands, saying nothing as to any distress being found thereon. The duty to search for distress had been imposed on the collector.

We think there is nothing in the objection, as a point of law, respecting the time when the collector made his return. That was a matter between him and the municipal council. It could not prejudice the owners of taxed lands that the warrant to sell for unpaid taxes should be delayed by the



collector's delay in making this return. As a question of fact we are prepared, in the absence of evidence to the contrary, to infer that the municipal council appointed the 8th of April for the collector to make the return, as they appear to have received it without objection.

We also think that the identity of the land in respect to which the collector was to collect this tax with the land afterwards sold by the sheriff, was sufficiently proved; and that is the important question. It was stated in argument, and no doubt the fact is so, that there are in this township concessions fronting on the St. Lawrence, and concessions fronting on the River *Aux Raisins*, and that the former are frequently, by way of distinction, called "front." This explains the insertion of that word, though without explanation it was clear that the same piece of land was referred to throughout, and that it was the land which the plaintiff claimed and the defendant asserted title to.

The presumption from the evidence is that the rates on the west half were paid, otherwise the collector would have returned the whole lot as in arrear. If so paid, a further presumption arises that the west half was assessed separately from the east, or the collector would have been guilty of a breach of duty if, the whole lot being assessed for one sum, he divided it and apportioned a part against each half. Either this was so, or the case fell within the 38th section of the statute, and the collector's return would be sustainable.

The giving a certificate by the sheriff to the purchaser at the sale is not a condition precedent to the sheriff's giving a deed. The 58th section explains the object and effect of such certificate, and it contains nothing to support the objection of want of proof of such certificate.

The objection to the description of the land conveyed is the most serious. The 57th section requires that the deed shall, among other things, describe *the land by its "situation, boundaries, and quantity."* The words of the deed are, "parcel of the lands in the said warrant mentioned, and being so advertised, that is to say, Eighty-nine acres of the South part of the East half of lot number twenty-five, in the second concession of the township of Charlottenburgh."

The objection is two-fold, 1st, that, generally, it is too uncertain as to what eighty-nine acres are intended, and therefore it is void; 2nd, that the statute requires three things, and that this deed points out no "boundaries," and therefore is insufficient.

The 53rd section should be read in connection with the 57th. By it the sheriff is to sell so much of the lands as shall be sufficient to discharge such taxes, "selling in preference such part of said real estate as he may consider it most for the advantage of the owner to sell first."

The sheriff is executing a power, and is bound to do so in compliance with the terms creating the power; he has to perform two acts, first, to sell, second, after the lapse of three years from the day of sale, to convey.

If the latter objection, that no boundaries are given in the deed of the land sold, must prevail, it is unnecessary to consider the more general question of uncertainty. The situation of the land sufficiently appears by the words, "the east half of lot number 25, in the second concession of the township of Charlottenburg," and the words "eighty-nine acres" demonstrate the quantity. None of these words *per se* touch the question of boundaries, for though there are modes fixed by statute for ascertaining the boundaries of lots and concessions, this statute requires the deed to describe them, and so excludes the application of the maxim *id certum est*, &c. Even if the east half had been sold instead of only eighty-nine acres of it, and the deed had conveyed the east half without giving any boundaries, it would not have been a *literal* compliance with the statute, though possibly it might be held sufficient as a substantial compliance. We are not dealing with that question. But if the number of the lot and concession and the name of the township belong, as we think, to situation, and the words eighty-nine acres to quantity, nothing is left for boundaries but "the south part," or at most "Eighty-nine acres of the South part;" and we have been unable to give such an interpretation to these words as to find in them a description or statement of boundaries.

Unless we hold that these words necessarily imply that

the whole width of the lot is to be taken from the front, so far towards the rear as is necessary to include eighty-nine acres, they do not in any way designate the boundaries of eighty-nine acres, and even then it becomes necessary to resort to calculation *dehors* the deed to find out that which the statute requires should be stated in it. And even then, we do not see that we can certainly assume that by thus defining the eighty-nine acres we ascertain such part of the land as the sheriff considered most for the advantage of the owner to sell. The result of his judgment on this matter should be shewn by the boundaries given, and not be left to the hazard of inference from general terms of so vague a character. The words "South part of the East half," are a singularly inappropriate expression to define eighty-nine acres of that which contains only a hundred.

This case, in our judgment, adds one more to the long list of those in which sales for taxes have proved ineffectual, and have caused serious loss to the purchaser, owing to the want of strict attention to the language of the statutes on the part of the officers required to carry the law into execution.

Perhaps the time is approaching when, instead of this system, which sometimes injures purchasers and more frequently proprietors, the law may be changed by making the occupiers of land liable for all arrears of taxes thereon, either by suit or by distress after suitable notice and demand. If the registry office had an annual return of taxes in arrear, so that intending purchasers or tenants might readily know the truth, they could protect themselves, and it might deter squatters if they were liable for taxes in arrear.

In our opinion the rule to enter a verdict for the plaintiffs must be made absolute.

Rule absolute.

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## COX V. JONES.

*Sale of lumber to be manufactured—Accidental fire—Proof of Acceptance.*

Plaintiff on the 7th of March, 1864, agreed to sell to defendant all the lumber which the new saw-logs at the plaintiff's mill would produce, to be cut in the manner specified, and delivered during the year at the railway station, at a named price per thousand feet.—Defendant to accept the same, and pay therefor as delivered. About the 21st of June defendant inspected and measured 21,072 feet at the mill. On the 29th he went with the plaintiff to the station, and the plaintiff told him there was then 75,000 feet there. On the 21st of July this was accidentally burned. By the 17th of August an additional quantity had been delivered, making in all \$119,000 feet, of which defendant was notified by the 20th.

The plaintiff having sued defendant on special counts for not accepting, and for goods sold and delivered, the jury were told that an acceptance might be proved either expressly or by permitting a reasonable time to elapse without objection after notice of delivery; and they found for the value of the whole quantity on the last count.

*Held*, that the verdict was right:—that the plaintiff could sue on the common count though all the lumber contracted for had not been manufactured, for defendant was bound to pay "as delivered," i.e., after he had received proper notice of delivery and had not objected; that the seller had done all that was requisite either on his own behalf or the buyer's, by sawing, measuring, delivering, and giving notice; and was therefore entitled to recover.

Defendant contended that the time for accepting the 75,000 feet had been extended by mutual agreement to a day after the fire, but the evidence on this point was contradictory.

The first count of the declaration stated that the plaintiff bargained and sold and the defendant bought all the lumber which the new saw-logs that were on the 9th of March, 1864, at the plaintiff's mill, in the township of Innisfil, would produce, on the terms that the plaintiff would cut and manufacture the best of the logs into three inch plank, any lengths and any widths, but nearly parallel, and would cut and manufacture the balance to the best advantage, in such size and manner as the logs would most profitably make,\* and should deliver the same on the switch near the Barrie station of the Northern Railway, convenient to the track for loading, during the year 1864, at the price of \$7 per thousand feet of board measure, and upon the further terms that the defendant should accept the same and pay the plaintiff therefor from time to time as delivered. *Averment*, that the plaintiff cut and delivered 75,000 feet board measure, according to the said agreement, and all conditions were fulfilled, &c., &c., to entitle the plaintiff to have the said 75,000 feet accepted—yet defendant would not accept or



pay; and the lumber was destroyed by fire at the switch near the Barrie station of the Northern Railway, where it had been delivered and was lying to be accepted by the defendant.

*Second count.*—That the plaintiff being owner of a saw-mill used for manufacturing lumber, at, &c., and having at his mill certain new saw-logs, agreed with defendant to cut and manufacture the said new saw-logs (as in the first count down to \*), and that all the lumber should be free from stubb-shott; in consideration whereof the defendant agreed to accept and to pay the plaintiff for the same as delivered, at the rate of \$7 per thousand feet, board measure. *Averment*, of manufacturing and delivering as in the first count, and that the plaintiff gave notice to defendant and requested him to accept the same, and a reasonable time elapsed to enable defendant to accept, and all conditions were fulfilled, &c., yet defendant did not accept the same, and the said lumber while at the switch for the defendant was destroyed by fire.

*Common counts* for goods sold and delivered, goods bargained and sold, and for interest.

*Pleas.*—1. That the plaintiff did not bargain and sell, nor did defendant buy the goods in the first count mentioned, as therein alleged.

2. Denial of the breach in the first count.

3. To first count, that before a reasonable time elapsed for defendants to accept or pay, and before any breach of defendant's contract, the lumber was, without the act or default of defendant, destroyed by fire; wherefore, and for no other reason, defendant did not accept or pay.

4. That the plaintiff was not ready or willing to deliver the 75,000 feet in the first count mentioned, or any part thereof.

5. That defendant was always ready and willing to accept and pay according to the agreement in the first count: that before any breach of that agreement by him, and when the lumber was so delivered by the plaintiff at the place aforesaid, it was agreed between plaintiff and defendant that defendant should attend by his servant or agent during the week then next following at the place aforesaid, and measure,

accept, and pay for said lumber, and the acceptance and payment was then postponed until the time aforesaid: that after this agreement, and before the time so agreed on for measuring, accepting, and paying for the lumber, the same was, without any act or default of defendant, accidentally destroyed by fire, for which reason, &c., defendant did not accept, &c.

6. Denial of breach in second count.

7. That before the lapse of a reasonable time, as in the second count mentioned, for defendant to accept and pay for the lumber, and before any breach of defendant's contract, the lumber was destroyed by fire.

8. That the plaintiff was not ready or willing to deliver the 75,000 feet mentioned in the second count, or any part of it.

9. To the second count, same as the 5th plea to the first count.

10. To the third count, never indebted.

Demurrers to the third, fifth, seventh and ninth pleas. Joinder in demurrer. Issue on all the pleas.

The trial took place in October, 1864, at Barrie, before *Adam Wilson, J.*

The plaintiff put in evidence the contract set forth in the second count. One Hugh Richards had looked at the logs, and on his report of them Charles W. Lount, who was admitted to be the defendant's agent, bought and signed the contract in defendant's name. It was dated the 7th of March, 1864.

The plaintiff had at the time old and new logs at his mill, and began sawing soon after the contract was signed. Evidence was given that the lumber was manufactured according to the terms of the contract, and that about the 20th of April the plaintiff began hauling to the switch, and continued until 75,000 feet were hauled: that the rotten lumber was picked out at the mill, and the stubb-shott cut off: that about the 21st of June Lount sent men to the mill to measure and inspect the lumber there; they were to measure at the switch afterwards; they measured 21,072 feet board measure at the mill: that on the 29th of June the plaintiff

asked Lount, in presence of one Shapcott, who was in the plaintiff's employ, if he was going to measure any more. They three went that day to inspect the lumber at the switch, and Lount made proposals to the plaintiff to be let off the bargain, which the plaintiff refused, and Lount said he supposed he must make the best of a bad bargain. Plaintiff at that time told him there were 75,000 feet there. On the 20th or 21st of July the 75,000 feet were burnt.

After this the plaintiff hauled to the switch 44,256 feet board measure, which included the 21,072 feet measured at the mill. On the 18th of August the plaintiff wrote to defendant, informing him that in pursuance of the contract he had delivered at the switch the remainder of the lumber then sawed, which, with the 75,000 feet before delivered, made in all 119,000, at \$7 per thousand, = \$833, which according to defendant's agreement should have been paid as delivered, and demanding an immediate settlement. This action was commenced on the 26th of August. At this time there were fifty logs or more at the mill uncut, small logs. All the lumber cut from the new logs had been hauled to the switch, except rotten stuff, which was still in the yard. They stopped sawing about the end of May for want of water, and could not manufacture all the new logs into lumber.

The plaintiff's witnesses represented that by "new logs," were meant logs that had been hauled that winter to the mill yard: that old logs meant those that had been cut a year or two. One of them said that some of the new logs were worm eaten, and the sap was dead. He said, however, that all these logs had been cut last winter, but perhaps out of timber that had been destroyed by fire. Lount asserted to the plaintiff, in Shapcott's presence, that he had no idea that "mill-culls" were included in his contract; that it was a mere swindle. The contract, however, contained the words following: "Jones is not to be compelled to take any rotten lumber *or mill-culls*." These last three words were struck through with a pen, and Hugh Richards swore that he was present when the contract was made, and that Lount drew his pen through the words "or



mill-culls." On the 16th of June, 1864, Lount wrote to the plaintiff, apologizing for not coming to measure the lumber "yesterday" as promised, and that the plaintiff might rely that Lount would come and measure up for him at the earliest moment he had time, hoping that this disappointment would not inconvenience the plaintiff.

On the defence, Lount swore that some time after the contract was made the plaintiff told him he was hauling the lumber to the switch, and after this he spoke to the plaintiff about measuring and inspecting, and plaintiff said it was not worth while till he had hauled all out. Again, early in June Lount told the plaintiff he would have all the lumber both at the mill and the switch inspected, and the plaintiff said it was of no consequence, but he would like that Lount should inspect what was at the mill before it was hauled. This was done by the men sent by Lount, and he swore that he told the plaintiff the inspection was not satisfactory, and offered to pay £10 to the plaintiff to give up the contract, urging that he had been imposed upon. Afterwards they went to the switch, and Lount offered \$100 to be off the bargain, which the plaintiff refused, but they parted on the understanding that the plaintiff was to think it over, and let Lount know what he would do. A week or so after they met, and plaintiff told him he would have to take the lumber, and on the plaintiff saying he would have the rest of the lumber hauled by the middle of the following week, Lount said he would be ready to measure it then, and told plaintiff to let him know when it was all out: that the plaintiff assented to this arrangement, and before that time came round the lumber was burned. In August Lount received notice from the plaintiff that he had hauled the rest of the lumber, but Lount measured no part of it except what was measured at the mill. The defendant sent the plaintiff's letter of the 18th of August to Lount. Lount swore that if at any time the plaintiff had asked him to come and measure the lumber he would have done it, and he would have paid him any money on account if he had wanted it: that the plaintiff was always very easy, and the measurement just remained over. He said he had not yet taken the 44,000 feet. The plaintiff



admitted that any rotten lumber at the switch might be rejected on inspection.

The plaintiff called witnesses to rebut Lount's statements. One witness swore that at the conversation in the beginning of July the plaintiff and Lount were so angry they did not have much to say to each other; they were only a few minutes together.

The learned judge directed that the jury should decide whether the defendant did or did not accept the 75,000 feet of lumber which was at the switch, and was destroyed by fire; if the defendant did accept the lumber, then the finding should be in his favour on the first and second counts; if he did not accept the lumber, then the second count would at any rate be proved; if he did accept it, then the third count, as to goods sold and delivered, would be maintained:

That an acceptance might be proved by an expression adoptive of it, or by permitting a reasonable time to elapse within which he might inspect or accept, without objecting to the lumber or the receipt of it: that defendant was to pay for the lumber as delivered at the switch, and 75,000 feet were delivered at the switch by the 11th of May; it was not destroyed until the 20th or 21st of July: that the plaintiff was bound to give notice when he had delivered it, and then defendant was entitled to a reasonable time to examine it, say a week or even a fortnight, but not more, if so much. He referred to Lount's letter of the 16th of June as shewing notice then; and that on the 29th the plaintiff, Lount and Shapcott were at the switch, and saw the lumber. He left to them to say if anything took place then which extended the time for inspection; if so, they should find for the defendant; if not, for the plaintiff. This was as to the 75,000 feet.

The learned judge thought there was no reason why the plaintiff should not recover for the 44,000 feet, under the third count. This quantity was delivered at the switch by the 17th of August, and the defendant had no notice before the 20th.

The defendant's counsel objected that no action would lie on the common counts until the expiration of the time for the

delivery of the whole, (the year 1864,) and that the jury should not have been told that the defendant must be deemed to have accepted the lumber after the expiration of a reasonable time after notice, and no objection having been made; nor that defendant was bound to accept within a reasonable time after notice.

The jury found for the plaintiff on the third count—119,000 feet @ \$7=\$833; and said defendant got just what he bought, and did accept the 75,000 feet.

*McMichael* obtained a rule *nisi* to shew cause why there should not be a new trial, the verdict being contrary to law and evidence, and for misdirection, in telling the jury there was evidence under the count for goods sold and delivered, and that the lapse of a reasonable time after the delivery at the station and notice to defendant was evidence of acceptance; and in not directing that, the contract being to manufacture, the plaintiff could not recover under the common counts, and the contract being for a specific quantity to be delivered at a given time, he could not sue on such counts before the expiration of the time and the delivery of the whole, and defendant had the option of rejecting or refusing to receive any part; also, on the ground of the discovery of fresh evidence, and on affidavits.

*McCarthy* shewed cause. He filed affidavits in answer, and cited *Fragano v. Long*, 4 B. & C. 221; *Simmons v. Swift*, 5 B. & C. 857; *Rohde v. Thwaites*, 6 B. & C. 388; *Hanson v. Meyer*, 6 East, 614; *Hinde v. Whitehouse*, 7 East, 558; *Rugg v. Minett*, 11 East, 210; *Langton v. Higgins*, 4 H. & N. 402; *Schofield v. Town*, 12 U. C. R. 439; *Mucklow v. Mangles*, 1 Taunt. 318; *Laidler v. Burlinson*, 2 M. & W., at p. 610; *Clarke v. Spence*, 4 A. & E. 467; *Turley v. Bates*, 2 H. & C. 200; *Aldridge v. Johnson*, 7 E. & B. 885; *Alexander v. Gardner*, 1 Bing, N. C. 671; *Browne v. Hare*, 4 H. & N. 822; *Dawes v. Peck*, 8 T. R. 330; *Supple v. Gilmour*, 5 C. P. 318, S. C. 11 Moore P. C. C. 571; *Blackburn on Contract of Sale*, 121, 160.

*McMichael*, contra, cited *Logan v. LeMesurier*, 11 Jur.

1091; *Clay v. Yates*, 1 H. & N. 73; *Rigney v. Mitchell*, 2 C. P. 266; *Gooderham v. Dash*, 9 C. P. 413; *Add. on Con.* 186.

DRAPER, C. J., delivered the judgment of the court.

The contract in this case is silent as to the measurement. We take it to be part of the seller's duty, in order to ascertain what sum he was entitled to recover.

He was to cut the logs into lumber of specified sorts, and to deliver such lumber at a named place. The price was \$7 per thousand feet, and the whole sum payable by defendant depended on the quantity, but the payment was to be made as delivered. The purchaser had a right to a reasonable time after the lumber was at the appointed place, to see if it was such as he was bound to accept. He might, if he pleased, measure, to see if the quantity was what the plaintiff stated. He had, in our view, no property in the logs until the plaintiff had manufactured them into lumber; but when manufactured, delivered at the proper place, and the quantity known, he was bound to pay. We think the words "as delivered" imposed on him the duty of paying as the lumber was delivered and he had a proper notice, and did not reject. This question must be decided upon the intention of the parties to the contract, the terms of which leave in my mind no doubt. As a mere question of fact, Lount's evidence that he would at any time on the plaintiff's request have measured the lumber, and would have paid him any money on account, tends to support the plaintiff's case.

The case of *Logan v. LeMesurier*, (6 Moo. P. C. C. 116, 11 Jur. 1091,) proceeded on the ground that the seller had not done that which was necessary to vest the property in the purchasers, for there had been no measurement or delivery at Quebec, and for want of these acts, to be performed by the sellers, the risk remained with them; and it is so put in the case of *Gilmour v. Supple*, (11 Moo. P. C. C. 570.) The latter case seems to me decisive in the plaintiff's favor. Here, as there, nothing remained to be done by the seller on behalf of the buyer, for he had sawed the logs into such lumber as the contract called for, had conveyed them to the place appointed, and given notice to the buyer; nor did anything



remain to be done by him on his own behalf, for he had measured the lumber at the mill, and so had ascertained the price of what he had delivered. All these facts are found by the jury, as well as that the defendant had a reasonable time to satisfy himself as to quality and quantity.

But it is objected that the contract was for sale of an entire quantity of lumber, to be manufactured out of particular logs, that the whole quantity had not been manufactured, nor had the time for fulfilling the contract expired when this action was brought, and therefore the plaintiff fails.

The stipulation in the contract that the defendant shall accept the lumber and pay for the same "as delivered" answers the objection. The undertaking, as we construe it, is to pay as the delivery goes on, and entitled the plaintiff to be paid for the 75,000 feet upon the facts proved. The defendant, through his agent, had notice of the delivery at the switch of this quantity more than a month before the fire. Measurement by him is certainly no condition precedent to the plaintiff's right to be paid. And as to the residue of the 44,000 feet, they were delivered just as the 75,000 feet were, nearly half having been measured by the defendant and the residue by the plaintiff at the mill. The jury have decided that the defendant had reasonable notice as to this quantity also, of which he may be said to have accepted 21,000 feet at the mill, subject to their being delivered at the switch, which delivery was proved.

With regard to the affidavits, the principal point suggested is that a conversation which is said to have taken place between Lount and the plaintiff, was asserted by Lount at the trial to have taken place about the beginning of July, but he has since discovered that it was about the 17th or 18th of July, and the lumber was burned on the night of the 20th. Lount, in his affidavit, states the judge's charge as he understood, and infers that if this conversation took place at the later date, it would have changed the direction given to the jury on this point,

But the jury were told that the notice to defendant of the delivery of the 75,000 feet was given before the 16th of June, the date of Lount's letter, and they were told that



from that time to the 29th of June a reasonable time had elapsed; and as to the latter conversation, to which Lount's affidavit refers, the learned judge told the jury that according to Lount's testimony the time for defendant to measure and inspect was extended to a day beyond the time of the fire, but according to the evidence for the plaintiff no such agreement was ever made.

This, which is the most important question, would not be affected by the date of the conversation, and the newly-discovered evidence relates only to a correction of this date. The jury have determined against the existence of any agreement so to extend the time, and the new evidence leaves the question of the fact of such an agreement just where it was at the trial.

We do not, therefore, think the defendant sustains his rule.

Rule discharged.

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### RIDDELL V. BROWN.

*Malicious arrest—Reasonable and probable cause—Evidence of—When to be left to the jury.*

Plaintiff sued defendant, in the first count, for maliciously and without reasonable or probable cause procuring him to be arrested, by a false affidavit that defendant had a cause of action against him for the seduction of his daughter; and in the second count for effecting the same object by falsely, &c., representing that he was about to quit Canada, with intent, &c. The plaintiff established a *prima facie* case on both counts, in answer to which defendant proved that he was present when his daughter made an affidavit before a J. P. that she was pregnant by the plaintiff: that he had been informed of statements made by the plaintiff affording a very strong inference of improper intercourse: that he was told the plaintiff had said he had "signed away" his place; and that he, defendant, had received a letter from the plaintiff's cousin, condemning the plaintiff for not marrying defendant's daughter, and telling defendant that it was his duty to look after him, as he was going to sell his place, and wanted to sell it to the writer.

*Held*, that these facts sufficiently shewed reasonable and probable cause: that as they were uncontradicted, there was no question for the jury; and that the plaintiff, therefore, was properly nonsuited.

The first count in the declaration was for maliciously and without reasonable or probable cause procuring from a judge of one of the superior courts of law a special order directing the plaintiff to be held to bail for \$200, and that the defend-

ant might issue a writ of *Capias ad Respondendum* to the sheriff of Grey, indorsed to hold the plaintiff to bail for \$200, by then falsely and maliciously representing to the judge, by a false affidavit, that defendant had a cause of action against the plaintiff for the seduction of the defendant's daughter Margaret; and that defendant, in pursuance of such order, caused to be sued out a writ of *capias*, and caused the same to be endorsed for bail for \$200, and caused the plaintiff to be arrested, and to be imprisoned on said writ, for, to wit, four months, and until the court ordered the plaintiff to be discharged; and such proceedings were had that the plaintiff obtained judgment against the now defendant, whereby the action was determined—*Per quod*, &c.

*Second count*, that defendant having no reasonable or probable cause for believing that the plaintiff, unless forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally or the defendant in particular, falsely and maliciously represented that such was the fact, by certain false affidavits, and by means thereof maliciously procured from a judge of one of the superior courts of law a special order directing (as in the first count to the statement of plaintiff's imprisonment for four months) and until the plaintiff applied to the court to be discharged out of the custody of the sheriff, on the ground that the plaintiff was not about to quit Canada, and that there was no good or probable cause for so believing; and such proceedings were had that afterwards, by a rule of court, it was ordered that the now plaintiff should be discharged out of the custody of the sheriff on the ground aforesaid—*Per quod*, &c.

*Plea*—Not guilty.

The trial took place at the assizes for York and Peel, in October, 1864, before *John Wilson, J.*

The plaintiff put in evidence the affidavits—three in number, one made by the defendant, and one made by each of his two sons—upon which the judge's order for the plaintiff's arrest was procured. He proved by a clerk in the office of the court of Common Pleas, in which the action against the now plaintiff was instituted, that search had been made for the writ, and it could not be found, and that there was

nothing in that office to shew that it had been filed. The plaintiff also put in a rule of the court of Common Pleas, of Trinity Term, 1863, ordering the plaintiff's discharge from arrest and custody in that cause. It was dated the 27th of September, 1863. He also produced an exemplification of the judgment obtained by the now plaintiff, as defendant in the original cause, for the now defendant's not proceeding as plaintiff to trial in that cause, although duly required to do so. The plaintiff also proved that the writ issued by the defendant against him was returned by the sheriff to the now defendant's attorney in that cause, and having proved notice to produce called on the defendant's attorney to produce it. It was not produced, but the learned judge allowed secondary evidence to be given, though objected to on the ground of want of sufficient search in the Crown office. The sheriff then proved a copy of the writ of capias as the one which he had served on the now plaintiff, and that the plaintiff was arrested on the writ on the 13th of July, 1863, and taken to gaol on the 14th, and was imprisoned until the 25th of September next following, when he was discharged on the rule.

The plaintiff also proved by three witnesses that he came to live in the township of Bentinck, in the county of Grey, in November, 1862, and, except for about a week in the March following, he was not away from there until his arrest: that he was engaged in improving his farm, diligently cultivating it, erecting a house and buildings, and that there was nothing to warrant a suspicion that he was about to leave the country; and he gave evidence of the damages he had sustained, including fees paid to witnesses to attend at an expected trial of the first suit, of which notice had been served, but the notice was countermanded, and in consequence the now plaintiff could not get the moneys paid to the witnesses allowed on taxing costs and entering judgment.

On the defence, it was proved that the affidavit of one Hugh Riddell was used by the now plaintiff in moving to set aside his arrest. The copy was put in, with copies of the other affidavits used on that application. It was proved this



was a true copy of the original, on the files of the court. It was also proved that the writ of *capias* had been filed in the Crown office on the 25th of August, 1863. The defendant also proved that he had received a letter from the same Hugh Riddell, dated the 17th of June, 1863, in which Hugh Riddell acknowledged the receipt of a letter from the now defendant, and said he had been to the now plaintiff, and spoke to him about the seduction of the defendant's daughter, and that the plaintiff would not do anything, and would not go and marry her; and added, "I think that is your duty to look after him as soon as you can. He is going to sell his place. He wanted to sell it to me, but I would not do that with him." He proved also that his (defendant's) daughter made an affidavit on the 25th of June, 1863, before a justice of the peace, that she was then pregnant, and that the plaintiff was the father, and that the defendant was present when the daughter swore to this affidavit. The child was born in August following. The daughter was married to another man in March, 1864, who had returned to this province from the United States about a month before.

One Bernard Fee swore that in the spring of 1862 the plaintiff was hired by one Johnston, in the township of Toronto, and left there in the end of October following: that the plaintiff told him in 1861, and in the spring of 1862, that he was "afraid of having done mischief to the girl in the fall," and asked Fee if he had heard any thing of it: that he, plaintiff, had signed his property to his brother. Fee told this to the defendant. Fee had seen them together a good deal. Defendant sent for Fee, to enquire what he knew about it, in the summer of 1863. Plaintiff came to Fee's house in the winter of 1862, but was not at that time in company with the defendant's daughter.

The defendant's counsel then desired to read in evidence the copy of the affidavit of Hugh Riddell, which the plaintiff had filed and used on the application to set aside his arrest, and discharge him out of custody. It was opposed on the ground that the original, and not a copy, should be produced. The learned judge allowed it to be read.



The defendant's counsel then contended that he had established reasonable and probable cause for the arrest, and therefore that the plaintiff should be nonsuited.

The plaintiff's counsel urged that it was a mixed question of law and fact whether there was reasonable and probable cause, and should be submitted to the jury.

The learned judge was of opinion that the defendant shewed reasonable and probable cause, and that the second count could only be established on the same ground as the first. And though he would have preferred that the case should go on subject to the point, yet as defendant's counsel pressed him to rule, he nonsuited the plaintiff, the plaintiff's counsel objecting.

*Robert A. Harrison* obtained a rule to shew cause why the nonsuit should not be set aside and a new trial granted, on the following grounds:—

1. That there was evidence on the plaintiff's part of a want of reasonable and probable cause, and that no objection to the contrary was made at the close of the plaintiff's case.

2. That at the close of the defence the question of reasonable and probable cause or the want of it became a mixed question of law and fact.

3. That the learned judge, notwithstanding, withdrew this question, and all facts and inferences of fact connected with it, from the jury.

4. That the plaintiff was improperly nonsuited on evidence which was adduced by defendant after the plaintiff's case was closed.

5. That if the question was for the judge, it was improperly decided.

The motion also asked to set aside the nonsuit, and for a new trial, on the same ground, and because the plaintiff was nonsuited against his will; and for misdirection, in telling the jury that the averments of malice and want of probable cause in the second count were material, and that without proof of such averments the plaintiff was not entitled to recover on that count; and for improper evidence in receiv-

ing the copy of Hugh Riddell's affidavit, without producing the original, or proving that Hugh Riddell had made such an affidavit, and that this affidavit having been made long after the arrest of the plaintiff was not evidence of probable cause; and for improperly receiving the affidavit of the defendant's daughter, without calling the magistrate before whom it purported to be sworn, and for improperly receiving in evidence the letter of Hugh Riddell, without calling him; and that the whole matter was improperly withdrawn from the consideration of the jury.

*J. H. Cameron*, Q. C., shewed cause, citing *Douglas v. Corbett*, 6 E. & B. 511; *Davis v. Hardy*, 6 B. & C. 225; *Blachford v. Dod*, 2 B. & Ad. 179; *Munns v. Dupont et al.*, Am. Lea. Cas. vol. I. 209, 225.

*Robert A. Harrison*, in support of the rule, cited *Wilson v. Thorpe*, 18 U. C. R. 443; *Wood v. Bowden* 23, U. C. R. 466; *Daniels v. Fielding*, 16 M. & W. 200, 205; *Fitzjohn v. Mackinder*, 4 L. T. Rep. N. S. 149, Ex. Ch.; *Rosc. N. P.* 551; *Hall v. Suydam*, 6 Barb. 83; *Payne v. Revons*, 2 F. & F. 367; *Busst v. Gibbons*, 30 L. J. Ex. 75.

DRAPER, C. J. delivered the judgment of the court.

It is well settled that whether the circumstances alleged to shew the existence or non-existence of probable cause existed is a matter of fact, and whether, supposing them to be true, they amount to probable cause, is a question of law. (*Johnstone v. Sutton* 1 T. R. 545; *Willans v. Taylor*, 6 Bing. 186.) But the difficulty generally is to determine whether the opinion of the jury should or should not be taken. In *Blachford v. Dod* (2 B. & Ad. 184) Lord Tenterden says he considers the correct rule to be, if there be any fact in dispute between the parties the judge should leave that question to the jury, telling them, if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant.

The case of *Davis v. Hardy* (6 B. & C. 225) shews that, although the plaintiff's case in the opinion of the presiding

judge sufficiently shews a want of reasonable and probable cause, yet upon proof of additional facts on the part of the defence, which satisfied the learned judge that there was reasonable and probable cause, he might properly nonsuit the plaintiff. The court held that where the witness who gave that evidence was unimpeached in his general character, where there was nothing in his demeanour or in the story he told to weaken or destroy his credibility, and he was not contradicted by opposing testimony, the case was not one for a jury to deliberate upon.

The language of Alderson, B., in *Mitchell v. Williams* (11 M. & W. 217) is to the same effect:—"It is only where some doubt is attempted to be thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that the judge is called upon to submit any question to the jury."

Now on this trial, at the close of the plaintiff's case he had certainly given *primâ facie* evidence of want of probable cause for alleging that he was about to leave Upper Canada, which was one principal ground upon which the judge's order for the plaintiff's arrest was founded. Part of the evidence which he produced was directed to the question whether he was guilty of the seduction of the defendant's daughter, for which the defendant had sued him and obtained the order to hold him to bail.

The defendant in answer gave evidence to establish that he had reasonable and probable cause upon both points. He proved that he was present when his daughter made an affidavit before a justice of the peace that she was pregnant, and that the plaintiff was the cause of her pregnancy. He further proved that he had been informed of statements made by the plaintiff affording a very strong inference that there had been an improper intercourse between the plaintiff and his (defendant's) daughter. He also proved that he was told that the plaintiff had represented that he had "signed away" his place, and that he had received a letter purporting to come from Hugh Riddell, in whose writing it was sworn to be, and who was a cousin of the



plaintiff's, in which the writer condemns the plaintiff's conduct in refusing to marry the defendant's daughter, and tells the defendant it was his duty to look after the plaintiff as soon as he could; that he was going to sell his place and wanted to sell it to him. All this came to the defendant's knowledge before he commenced proceedings against the plaintiff.

We think this sufficiently established reasonable and probable cause in the defendant's favour. The question is not whether the facts communicated to the defendant were true or not, but whether he had reasonable or probable cause for believing them.

As we understand the second count, it involves the question of reasonable and probable cause as plainly, though not to the same extent, as the first. The *gravamen* is that the defendant falsely and maliciously, by certain false affidavits, represented that the plaintiff was about to quit Canada, with intent to defraud his creditors or the defendant, having no reasonable or probable cause for so believing, and by means thereof procured a special order for the plaintiff's arrest. The same evidence of want of probable cause which was given to sustain the first count, as to the intention of going away, was applicable to the second, and the evidence given by the defendant relative to the absence of that intention was applicable to the second count, to establish the existence of that reasonable and probable cause the absence of which is stated in the second count.

It appears to us the plaintiff was properly nonsuited. The authorities already referred to, applied to the evidence given, satisfy us that there was no question for the jury to deliberate upon. The facts sworn to shewing probable cause were wholly uncontradicted, and the witnesses who detailed them were not impeached, and the facts were of that distinct character that there was no question as to the correct inference to be drawn from them. As to the defendant's belief of them, it would be very material on the question of malice, but if their undenied existence shewed probable cause, that cause remained, however malicious the defendant might have

been, and while it remained the present action could not be sustained.

In our opinion, therefore, the rule should be discharged.

Rule discharged.

# WATSON V. THE NORTHERN RAILWAY CO. OF CANADA.

*Railway—Accident—Plaintiff wrongfully in the baggage car—Contributory negligence—Excessive damages.*

The plaintiff travelling in defendants' train on a passenger ticket, went into the express company's compartment of a car, of which the other two compartments were for the post-office and the baggage. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's arm was broken. The compartment in which he was was not intended for passengers, but it appeared that they frequently went in there to smoke, and that the conductor had twice passed through it while the plaintiff was there without making any objection. No person in the passenger cars was seriously injured. It was proved that notice that passengers were not allowed to ride upon the baggage car was usually up on the inside of each door of the passenger cars, and on the door of the baggage car, but not distinctly shewn that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out; and so that he was not to blame.

*Held*, that assuming the plaintiff was aware of the notices and nevertheless went into the baggage car, the defendants were not thereby excused under all circumstances; and that the jury were warranted here in finding that the plaintiff did not so contribute as to prevent him from recovering, the collision having resulted entirely from defendants' gross negligence.

*Held*, also, that sec. 107 of "*The Railway Act*" did not apply.

The jury having given \$2000 damages, and the evidence as to the injury being very loose, no medical witness having been called, the court granted a new trial on payment of costs.

The plaintiff in his declaration sought to recover for injuries sustained by him as a passenger in a railway train of defendants, caused by the negligence, carelessness, default and improper conduct of the defendants and their servants.

The defendants pleaded, 1st, not guilty, and, 2nd, that at the time when, &c., there were on the railway certain cars of the defendants for the carriage of the baggage of passengers, and other cars which were used for passengers only, and on which only defendants undertook to carry the plaintiff: that it was the duty of the plaintiff to remain during

his journey in the cars which were used for passengers only, and not to ride upon any of the baggage cars, of which the plaintiff had notice: that at the said time the plaintiff did not remain on the said journey in the passenger cars, but at the time when he was injured he was wrongfully travelling in the baggage cars, without the knowledge or consent and against the will of the defendants; and in consequence of so travelling in the baggage cars the plaintiff was so injured, and of his own wrong contributed to the damage so done to him.

The plaintiff took issue on both pleas, and replied to the second, denying that defendants undertook to carry the plaintiff in the passenger cars only, and denying that at the time of his being injured he was wrongfully in the baggage car, without the knowledge or consent and against the will of the defendants. Further replication *de injuriâ*.

The case was tried at the assizes for York and Peel, in October, 1864, before *John Wilson, J.*

It appeared that on the 8th of January last the plaintiff was a passenger by a train going towards Bell Ewart. He came into the cars at Richmond Hill. There were two passenger cars on that day. In front of them was a car divided into three compartments; one for the express company, a second for the post-office, and the foremost for baggage. That for the express company was the compartment nearest to the passenger cars. This compartment was not for passengers to ride in; it is a private compartment for the express company, but passengers who smoke do very frequently go into this compartment or into the baggage compartment to smoke. The plaintiff went into this compartment, and was there when he was injured. There was no question raised but that the injury was caused by the negligence of the defendants' servants, who were running another train than that on which the plaintiff was, and coming up behind ran into the first train, which was stationary at the time. The plaintiff had a ticket, which, after the accident, he gave to a person, who was called as a witness, to go to Bell Ewart for him. The defendants issued only one kind of ticket, first-class pas-



senger tickets, and it was sworn by the conductor that it was expected passengers should remain in the passenger cars, but that they will go into the express car to smoke. It was sworn that the conductor passed twice through the express car while the plaintiff and others were in it without making any objection.

It appeared that it was the practice to have a notice on each door of the passenger cars (inside, as would seem) that passengers were not allowed to ride upon the baggage car, and also one on the door of the baggage car. It was the business of one of defendants' servants, who was called as a witness, to keep these notices up. He could not swear that they were up on the day of the accident, but he said he had no reason to doubt it. No witnesses on either side stated whether such notice was or was not up on the day of the accident. No person was seriously or severely injured who was in the passenger cars on this occasion.

The plaintiff's right arm was broken. One witness stated that the plaintiff remained four weeks and a-half at his house after the accident, and was attended by two doctors: that he suffered a great deal, and had to be attended night and day: that he saw the plaintiff a month after he left this witness's house, and his arm was still in a sling: that it was a great deal smaller than the left; and, as the witness thought, his right arm was useless at the time of the trial. Another swore that the plaintiff carried his arm in a sling until February: that the right arm was of little use, and the plaintiff used his left arm most, for the right arm was paralysed. No medical witness was examined.

A nonsuit was moved for, on the ground that the contract set out in the declaration was not proved. It was further objected, that the plaintiff was not entitled to recover, because he was in a part of the train where he ought not to have been.

The notices were put in on the part of the defendants, but were not forthcoming in term.

The learned judge directed, that the plaintiff's duty, as having a first-class ticket, was to go into the passenger cars: that if he saw the notices, or had knowledge of them when he bought his ticket, then he took it under the condition that

he should not be in the baggage car, and if he were not in the proper car the second plea was proved.

The jury assessed the plaintiff's damages at \$2000, but said he was wrongfully in the baggage car: that though wrongfully there the conductor did not order him out. The learned judge then asked them to consider whether the defendants had made out their second plea, and told them that whether the plaintiff had notice or not was not material, for his duty was to go on the proper car. The jury then gave a verdict for the plaintiff on all the issues, and \$2000 damages. They said the Company gave him a ticket, but did not tell him on which car he ought to ride, that he went into the baggage car, and the conductor did not tell him to go out, and so they clear the plaintiff of blame.

Leave was reserved to defendants' counsel to move for a nonsuit, on the objections taken at the close of the plaintiff's case.

*G. D'Arcy Boulton* obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, the verdict being contrary to law and evidence and the judge's charge, and for excessive damages; or why a nonsuit should not be entered pursuant to leave reserved, on the ground that the plaintiff contributed to his own injury by being improperly in the baggage car.

*D. B. Read*, Q. C., and *Robert A. Harrison* shewed cause, citing *Walker v. The York and North Midland R. W. Co.*, 2 E. & B. 750; *Giles v. Taff Vale R. W. Co.* Ib. 828; *Morville v. The Great Northern R. W. Co.*, 16 Jur. 528; *Scothorn v. The South Staffordshire R. W. Co.*, 8 Ex. 341; *Emblen v. Myers*, 6 H. & N. 54; *Tuff v. Warman*, 5 C. B. N. S. 573; *Britton v. The South Wales R. W. Co.*, 1 F. & F. 171; *Freemantle v. London and North Western R. W. Co.*, 9 W. R. 612; *Redfield on Railways*, 381-5; *Carroll v. New York and New Haven R. R. Co.*, 1 Duer 571.

*J. H. Cameron* Q. C., and *Boulton*, in support of the rule, cited *Waite v. The North Eastern R. W. Co.* 27 L. J., Q. B., 417, S. C. in Ex. Ch. 28 L. J. Q. B. 258; *Stockdale v. The Lancashire and Yorkshire R. W. Co.* 8 L. T. Rep. N. S. 289; *Consol. Stats. C. ch. 66, sec. 107.*

DRAPER, C. J.—It seems beyond question that the defendants' servants, conducting a train which was coming behind the train on which the plaintiff was a passenger, negligently ran into the last mentioned train, which was stationary at the time; and this was the proximate cause of the injury to the plaintiff.

The defence set up was, that the plaintiff was being carried on a contract, of which it was a term that he should travel only in a passenger car: that when the accident happened he was in another part of the train: that if he had been in the passenger car he would have sustained no injury, or at least not so severe an injury.

The defendants cannot complain of the direction to the jury. It appears to me to be too much in their favor, as being open to the construction that if the plaintiff was injured in any other part of the train than in a passenger car, the defendants would not be responsible, although the gross negligence of their servants was the immediate cause of such injury.

Assuming that the plaintiff was aware of the notices, and nevertheless went into the baggage car, I do not think the defendants thereby excused under all circumstances from liability for injury to the plaintiff. The jury stated that he was wrongfully in the baggage car—that is, that he went there in disregard of the notices; but they also thought that the conductor acquiesced in his remaining there, and they treated that apparently as making a difference. It was in reference to this expression of opinion by the jury that we were referred to *Stockdale v. The Lancashire and Yorkshire Railway Company*, (8 L. T. Rep. N. S. 289; 11 W. R. 650.)

The case of *Dimes v. Petley*, (15 Q. B. 276,) shews that although negligence and improper conduct on the part of the plaintiff (continuing a nuisance in a navigable river) contributes to the accident, yet he may recover if the defendants could have avoided it by ordinary care and skill.

The negligence of the defendants' servants was the sole apparent cause of the hindmost train running into the other. The plaintiff was in no sense contributory to this accident. The utmost that can be said is, that the injury to himself



probably arose from, or was rendered much more serious by, his being in the baggage car. Still the plaintiff could not maintain an action merely on the ground that one train was negligently run into the other. He must shew some damage occasioned to himself from that negligence, and if, within the meaning of the authorities, he can be properly said to have contributed to the injury for which he is seeking redress, he cannot recover.

In my opinion the jury were warranted in finding that the plaintiff did not so contribute as to deprive him of the right to recover. Giving the fullest weight to the considerations urged for the defence—such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding that the plaintiff saw them, though this was not proved—I do not think they preclude the plaintiff from recovering, where the injury he sustained was caused by a collision resulting entirely and directly from the gross negligence of the defendants' servants.

In *Hamilton v. The Grand Trunk Railway Co.*, (23 U. C. R. 600,) I yielded to the weight of authority, and held that the defendants might, by special contract, free themselves from liability for negligence in the carriage of goods. If the defendants were held irresponsible in this case on the grounds put forward, we should, I fear, be laying the foundation for a similar claim to relieve themselves by the terms, express or implied, of their contract to carry, from liability in the conveyance of passengers. I am not disposed to sanction a first step in that direction, where the passenger is carried for hire.

As to the damages, I confess they appear to me extremely large, especially looking at the loose evidence of the actual injury, and its probable permanent character. I am not disinclined to grant a new trial for this reason, on payment of costs. I fear that juries are too much inclined to exaggerate the compensation to be given where railway companies are defendants; and the conclusion of the court is to give a new trial on those terms.

HAGARTY, J.—The defendants relied much on sec. 107

of "*The Railway Act*," Consol. Stats. C., ch. 66, "Any passenger injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, shall have no claim for the injury, provided room inside of such passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time."

The facts of the case before us do not necessarily raise any question on this clause.

The plaintiff was at the time of the accident in a compartment used by the express company next adjoining the passenger car, and into which passengers frequently came to smoke, and the conductor saw him there and made no objection.

As he does not come within the very strong words of this clause, the case is unembarrassed by legislative provision.

I think the fallacy of defendants' argument lies in a confusion of the causes of damage, or in asserting that the plaintiff by his own neglect substantially contributed to the injury.

The cause of damage, the proximate and only intelligible cause, is the admitted neglect of defendants' servants in allowing another of their trains to strike against that on which the plaintiff was. Could the plaintiff by ordinary care have avoided being injured by defendants' neglect? Even if he knew a collision was inevitable, it would be the idlest speculation as to which part of the train would receive the most violent shock. As it happened, he would probably have escaped injury had he remained in the passenger car. It might, with equal probability, have happened that those in the passenger car might have suffered most severely.

Therefore, irrespective of any legislative enactment, or any special contract limiting the defendants' liability, can it be truly said that where a negligent collision causes the injury, the mere fact that the plaintiff happened to be in a compartment to which passengers were constantly permitted access, and in which his presence was unobjected to by the conductor in charge, in any way contributed to the injury?

As Lord *Campbell* says, in *Dowell v. The Steam Navigation Company*, (5 E. & B. 206,) "In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident; and in these cases the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies v. Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss."

And in *Witherley v. The Regent's Canal Company*, (12 C. B. N. S. 2,) *Byles, J.*, says, speaking of *Tuff v. Warman*, (5 C. B. N. S. 573,) "The jury were told that if the negligence or default of the plaintiff was in any degree the *direct* or *proximate* cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant; but that, if the negligence of the plaintiff was only *remotely* connected with the accident, then the question was whether the defendants might by the exercise of ordinary care have avoided it; and it was held that this was a proper direction."

It may not be an unfair application of this principle to ask whether the defendants might by the exercise of ordinary care have avoided the collision, by which the plaintiff, at that moment negligently occupying a compartment not ordinarily used for passengers, was injured.

In the former case, in answer to counsel urging "that Lord *Tenterden* used always to tell the jury that, in order to find a verdict for the plaintiff, they must be of opinion that the accident was occasioned by 'the mere negligence of the defendant,' (which is the old form of declaration) and that they could not find such verdict if the negligence of the plaintiff had contributed to the accident," Lord *Campbell* says, "He used, however, always to make



them understand that this was said of negligence actively contributing to the accident."

*Greenland v. Chaplin*, (5 Ex. 244,) is much in point. Two steamboats came in collision. The defendant's boat was to blame. The plaintiff was a passenger in the other boat. The anchor of the latter boat fell on the plaintiff's leg and broke it. It was contended that the anchor in the plaintiff's boat was improperly stowed, and otherwise would not have broken loose at the shock, and that the plaintiff was standing by it in a part of the vessel where as a passenger he should not have been, and therefore contributed to the injury.

The learned Chief Baron at the trial adopted that view, but the jury still found for the plaintiff. Next term, in giving judgment, he admitted that he was wrong, and adds, "I entirely concur with the rest of the court, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action."

I also refer to *Scott v. Dublin and Wicklow Railway Company*, (11 Ir. C. L. Rep. 377,) where the whole law, especially as to proximate and remote causes, is elaborately reviewed by *Pigot*, C. B.

I should be sorry if any thing said in this judgment should seem to weaken the salutary rule, that railway passengers should be as careful as possible to observe all directions and regulations as to their places and conduct in a train. I can easily imagine cases where a disobedience of such rules might lead to fatal results. A passenger might improperly, and without the knowledge of those in charge of the train, enter a compartment not intended for his use. The train might in the dark, (as in one of the cases cited,) stop at a station where perhaps only the passenger carriages were opposite the platform. If the passenger attempted to descend from a place where he could not reasonably be

expected to be, and fell and injured himself, I hardly think he should be allowed to obtain compensation for an injury which in such a case would be proximately caused by his own neglect.

I concur in thinking that if defendants desire a new trial on payment of costs it should be granted. Another jury may perhaps require stronger evidence, based on professional knowledge, of the actual extent of the plaintiff's injuries, and his consequent claim for damages.

MORRISON, J., concurred.

New trial, on payment of costs.

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## THE GREAT WESTERN RAILWAY COMPANY V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

*Railway Cos.—Agreement within "The Railway Act," sec. 131—Consent of shareholders not obtained—Action on common counts.*

The Great Western and Grand Trunk R. W. Cos. on the 27th of February, 1860, with a view to avoid competition, entered into an agreement under their respective corporate seals, providing for the same rates on through traffic to be charged by each, for the division of the profits from such traffic in specified proportions, and for the rendering mutual monthly accounts, &c. To a declaration by the G. W. against the G. T. on the common counts, defendants pleaded this agreement, alleging that it had not been consented to by two thirds of the shareholders of either company, as required by the statute, and that the moneys sought to be recovered by the plaintiffs accrued to them only under such agreement. *Held*, on demurrer, a good defence, for that the agreement was clearly within "*The Railway Act*," C. S. C., ch. 66, sec. 131, (a consolidation of the 22 Vic., ch. 4, then in force,) which makes such consent a condition precedent to its validity.

ACTION on the common counts, for money payable by the defendants to the plaintiffs for tolls, rates and fares, due from the defendants to the plaintiffs for the tonnage of goods and transport of passengers carried for defendants upon a railway of the plaintiffs, for work and materials, money lent, money paid, money received, on accounts stated, and for interest—claiming \$50,000.

Defendants pleaded, that after the passing of the 22 Vic., ch. 52, and 22 Vic., ch. 4, the directors of the Grand Trunk Railway Company of Canada, the defendants, and the directors of the Great Western Railway Company, the

plaintiffs, made and entered into an agreement in writing, which agreement is in these words :—

The agreement, dated the 27th of February, 1860, was then set out at length. After reciting that it was most desirable to avoid a system of competition, injurious to both parties, it proceeded: "Now these presents witness, that for the purpose of effecting such arrangement, and other the premises herein contained, the said parties to this agreement of the first and second parts, do for themselves and their successors, respectively, covenant, declare and agree to and with the other of them, in manner as follows, that is to say :—1. That inasmuch as the rates by the shortest route must practically govern the through rates between competing points, the through fares for passengers and rates of freight between Detroit and Boston and Portland, *viâ* the Grand Trunk, shall be always the same as from Detroit or Windsor to Boston or Portland *viâ* the Suspension Bridge and Albany, and that the rates by the latter route shall from time to time, and at all times during the continuance of this agreement, be adopted and charged by both parties hereto. 2. That rates and fares for through passengers and through freight, to and from Detroit or Windsor, and competing or common points in the New England States, shall in like manner be the same both *viâ* Suspension Bridge and Toronto; 3. That the same principle shall be adopted in fixing the fares and rates for traffic to and from Sarnia and Port Huron, for the traffic mentioned in clauses numbers one and two; 4. That the through fares and rates between London and Toronto shall be the same by both lines of railway." It then provided for the keeping of accounts, and for monthly statements, shewing the quantity and amount received by both companies for the traffic mentioned: that each party should deduct 35 per cent. for cost of carrying, and the balance, after such deduction, should be divided between the companies in specified proportions; and that the books of both companies should be accessible to verify the accounts.

Various provisions followed, for the expressed purpose of



avoiding competition, as to connections with other lines—against either party except by mutual assent entering into any arrangement with other railways to be made in Western Canada affecting this agreement—for the use of cars—respecting local rates—for arbitration in case of disputes, or if the agreement should be found to work unfairly, &c., &c.—for preventing traffic arrangements with the Northern Railway at lower rates than those charged from Toronto to Detroit—and for the working of the Northern Railway for the joint benefit of the contracting parties, and with an equal division of profit and loss, should that railway fall into the hands of the Grand Trunk Company. The agreement was to last ten years from the 1st of December, 1859. It was signed by the president of the Grand Trunk, and the managing director of the Great Western Company, and the corporate seals of both companies were affixed.

The plea then averred that the agreement never was submitted to the shareholders of the Grand Trunk Company, nor consented to by the vote of two thirds of the proprietors of the said company, voting in person or by proxy, at any general meeting of the said proprietors, or by two thirds thereof in any manner whatsoever, as required by the first mentioned statute, nor was it submitted to the shareholders of the Great Western Railway Company, nor consented to by them, as required by the statute secondly mentioned; and that the moneys sought to be recovered in this action accrued under the said agreement, and not otherwise, and except thereunder none of the moneys sought to be recovered in the action ever accrued to the plaintiffs; and that the said agreement was, for the causes aforesaid, illegal and void.

To this plea the plaintiffs demurred, upon the following grounds:

1. That the said plea is no answer to the plaintiffs' declaration, and the causes of action therein. 2. That the said declaration shews a cause of action for freight earned for the carriage of goods and passengers by plaintiffs for defendants, the receipt of money by defendants for plaintiffs' use, and accounts stated: that there is nothing in law to prevent the liability of defendants to plaintiffs on such causes of

action without any formal agreement, and the agreement as set out does not in terms cover such causes of action.

3. The said plea admits the causes of action, and does not shew anything to avoid the same. 4. That it is not averred that the said agreement was in force when the services were rendered by plaintiffs to defendants and their causes of action arose, but, on the contrary, it is alleged said agreement was void and not in force. 5. That if the said agreement was in force it would not bar the action, as there is no covenant contained therein to pay, and nothing to preclude the stating of an account in reference to the matters of the said agreement, and an action in the present form on such accounting. 6. It is not averred that the plaintiffs had notice of the want of concurrence in the said agreement by defendants' shareholders.

*M. C. Cameron*, Q. C., for the demurrer, cited *Muschamp v. The London and Preston Junction R. W. Co.*, 8 M. & W. 421; *Wilby v. West Cornwall R. W. Co.*, 2 H. & N. 703; *Cocking v. Ward*, 1 C. B. 858; *Yates v. Aston*, 4 Q. B. 182; *Pearman v. Hyland*, 22 U. C. R. 202; *Hare v. London and North Western R. W. Co.*, 2 Johns. & Hem. 80, S. C. 7 Jur. N. S. 1145, 30 L. J. Chy. 817; *Hodges on Railways*, 98.

*J. H. Cameron*, Q. C., *John Bell* with him, contra, cited *Maunsell v. Midland Great Western R. W. Co.*, 1 Hem. & M. 130; *Shrewsbury and Birmingham R. W. Co. v. North Western R. W. Co.*, 6 H. L. Cas. 135; *Hattersley v. The Earl of Shelburne*, 31 L. J. Ch. 873.

HAGARTY, J.—I am of opinion that this agreement comes within both the letter and spirit of sec. 131, ch. 66, Consol. Stats. C., (being the Railway Clauses Consolidation Act.)

This section provides that the directors of any railway company may make and enter into any agreement or arrangement with any other company, either in Canada or elsewhere, "for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the

division and apportionment of tolls, rates and charges, in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years," &c., &c. "subject to the consent of two thirds of the stockholders voting in person or by proxy." A similar provision will be found in the Grand Trunk Amendment Act, 22 Vic., ch. 52, sec. 10.

By the next clause, of ch. 66, this is made to apply to every railway made or to be made in this province, but is not to apply to anything done before the 30th of June, 1858.

Nothing was suggested on the argument against the application of these sections to the plaintiffs' company.

I have examined all the authorities cited, and some others bearing upon the "*ultra vires*" question; but as I think the statute expressly regulates such an agreement as this, it must, I think, stand or fall thereby.

I think that the authority to make such an agreement, "subject to the consent of two thirds of the stockholders," requires the expression of such consent as a condition precedent to the validity of the agreement, and I cannot accede to the plaintiffs' view, that at all events the agreement is legal and operative till dissent be expressed. The consequences of such a view might be disastrous to shareholders, and subversive of the wholesome restraint imposed by the legislature.

Nor can we, on demurrer to a plea averring the absence of such consent, make any presumption as to shareholders having sanctioned it.

In a recent case, *Re British Provident Life and Fire Assurance Society, Ex parte Grady*, (8 L. T. Rep., N. S. 98, 9 Jur. N. S. 631,) Lord Chancellor *Westbury* says, "If a company has no power to do a particular thing, undoubtedly that power cannot be added to the company, either by agreement of shareholders, nor can it be inferred to have been done legally merely from acquiescence or from subsequent delay in questioning the transaction. But if a company has power to do a thing, and if there be only requisite a particular formality, such as the consent of a general



meeting, in order to warrant the exercise of that power, then, if I find the company dealing with an individual at arm's length, and taking a transfer of shares, duly completing that transfer, entering the transfer, and entering the transaction in books, so that I am justified in imputing a knowledge of it to every shareholder, I am fully borne out, not only by the reason of the thing, but by the express authority of the case which I have referred to, in inferring, as against the company, that the formality, which alone is wanting to the exercise of the power, had been either antecedently supplied, or had been subsequently added to the transaction."

This case was not relied on by the plaintiffs. I cite it as perhaps on first view favorable to their contention. But nothing of that kind can be here assumed against the positive averment of the non-consent and the plaintiffs' admission thereof. This was a contract which could only be made in a specified way, with a party equally bound by statute to pursue such way, and fully aware of its necessity. (a)

Without entering into a review of the cases, it may be well to notice the language of Lord *Cranworth*, C., in 6 H. L. Cas. 135: "I agree to the proposition urged by the appellants, that, *primâ facie*, corporate bodies are bound by all contracts under their common seal. When the legislature constitutes a corporation, it gives to that body *primâ facie* an absolute right of contracting; but this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*. And the question here, as in similar cases, is whether there is any thing on the face of the Act of Incorporation which expressly or impliedly forbids the making of the contract sought to be enforced."

The Chancellor, at page 136, cites approvingly the words of *Parke*, B., in the *South Yorkshire Railway Company v. The Great Northern Railway Company*, (9 Ex. 84,) "Where a corporation is created by an act of parliament for particular

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(a) See *Gregory v. Patchett*, 11 L. T. Rep., N. S. 357.

purposes, with special powers, then indeed another question arises; their deed, though under their corporate seal, does not bind them, if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*; that is, that the legislature meant that such a deed should not be made."

It is sufficient to say here that the legislature has pointed out how such a contract as that before us may be legally made, namely, by consent of two-thirds of the shareholders; and as such consent never was obtained, therefore the deed cannot be supported.

It is unnecessary to express any opinion as to whether such an agreement as this, irrespective of the 131st section, is or is not *ultra vires*.

The defendants urge that if the agreement be valid the plaintiffs must sue on it, and not on the common counts. The plaintiffs answer by urging that it contains no covenant on which they could sue, and cite cases, such as *Yates v. Aston*, (4 Q. B. 182,) on that head.

I think this answer untenable, as the agreement begins by an interchangeable covenant between the parties for the doing all the things after mentioned.

A more important answer is also given, namely, that assuming the agreement to be *ultra vires*, nevertheless the parties might state an account of mutual claims, and of any moneys actually due by defendants to plaintiffs for any cause of action, or might recover for freight carried on the plaintiffs' road, and for which defendants would be liable, or for any money actually paid by them or for their use to defendants under an agreement not for any illegal or immoral purpose, but simply *ultra vires*, or not completed by necessary legal forms; such as the case raised in *Cocking v. Ward*, (1 C. B. 858.)

The defendants meet this by averring in the plea that the moneys sought to be recovered in this action accrued under the agreement, and not otherwise.

I feel some hesitation on this. The plaintiffs had two courses open—either to demur to the plea, as they have

done, or by replying facts to shew that they are suing for causes of action unconnected with the agreement; or (I presume) they might say for moneys received by defendants in pursuance of a void agreement, and which they claimed to be returned to or handed over to them.

Looking at the terms of the agreement, I can hardly see how the latter case could arise, unless the plaintiffs seek to get back moneys paid by them to defendants under the agreement as the share and proportion of the latter of freights, &c., received by plaintiffs, and now sought to be recovered as paid without consideration under a void contract. This was not suggested, however, on the argument.

The most obvious claim on the agreement would be for moneys coming to the plaintiffs on the monthly statements of receipts for all services on defendants' line, out of which the agreement provided that the plaintiffs were to receive a specified proportion. If this be the subject matter of the suit, it must, I think, fall with the agreement, on which alone it would be payable.

I find by the judge's order attached, that the plaintiffs have leave to take issue as well as to demur to this plea, so that our judgment on the insufficiency of the agreement will not prevent their asserting the existence of causes of action not covered by the agreement, or that the suit is brought for moneys paid under a void bargain and sought to be recovered back.

But as the pleadings stand, I think our judgment on the whole should be for the defendants on demurrer to the plea.

DRAPER, C. J.—I agree with the judgment just delivered by my brother *Hagarty*, on the ground that the agreement set forth in the plea was not valid and binding on either of the parties to this action for want of the consent of two thirds of the proprietors: that the plea asserts, both affirmatively and negatively, that the plaintiffs' claim sought to be recovered in this action accrued under that agreement, and that the demurrer admits it.

The declaration being in the most general form on the *indebitatus* counts, to which never indebted is pleaded, the



plaintiffs may without difficulty go into evidence of any other claim they have, not within the agreement, and the same evidence will probably tend to sustain the issue on the general traverse of the truth of the second plea.

MORRISON, J., concurred.

Judgment for defendants on demurrer.

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### THE BANK OF MONTREAL V. DAVID SCOTT.

*Bill of Exchange—Waiver of notice of dishonor—Evidence of.*

The plaintiffs sued the drawer of a bill of exchange for \$1,000, upon it and two notes, for \$1,000 and \$500 respectively. No notice of dishonor of the bill had been given, but the plaintiffs' agent swore that after its maturity, in conversations with him respecting the whole liability, defendant appeared willing to pay if time were given, and said that if he and his brother (the acceptor) got time it would be all right. He said, however, that this bill was never particularly mentioned, and no promise made relating to it specifically.

*Held*, not sufficient to warrant a verdict for the plaintiffs, and such verdict having been found, a new trial was granted without costs, unless the plaintiffs would consent to a *stet processus* on the count upon the bill.

This was an action brought to recover the amount of a foreign bill of exchange, dated the 29th of April, 1864, drawn by defendant on Robert Scott, of Buffalo, payable two months after date, for \$1,000, which was set out in the first count of the declaration; and also the amount of two promissory notes, for \$1,000 and \$500, respectively, made by Robert Scott, and indorsed by defendant, and set out in the second and third counts. Upon these last two counts no point arose.

*Plea* to the first count.—No notice of dishonor of the bill.

At the trial, at Stratford, before *Draper*, C. J., the plaintiffs called the agent of the bank at Stratford, who proved that he discounted the bill: that he was absent when it fell due on the 2nd of July last, and did not return until the 13th of July. He stated, "I saw defendant, and we had conversations respecting this bill and the two notes. Defendant appeared willing to pay if time were given, and said if he and his brother got time it would be all right. I, and defendant, and Robert Scott, afterwards met at Buffalo, and I wanted security. Robert refused, but said all he wanted was time; he would lose money if he had to

realise the stock. He (Robert) asked the amount, and David (defendant) told him about \$4,000, and said that his affairs were in that condition that he was anxious to have it settled. Robert Scott said that any trouble his brother was put to he would see him through."

On cross-examination he stated, "This bill was never particularly mentioned in any conversation I had with him, defendant; the whole debt was included. In the conversation at Buffalo, Robert Scott inquired as to the whole of these notes, or what was the amount between them. He (defendant) never made any promise relating to this bill particularly. The plaintiffs held on defendant's account, \$4,000, in American securities. These securities were sold, and the proceeds agreed to be appropriated to payment of bills amounting to \$1,500 by order of Robert Scott, and there is some balance remaining applicable to the present demand."

Upon this evidence it was objected, on the part of the defendant, that there was no evidence to go to the jury that want of notice was ever waived, and that there was no evidence of a promise to pay.

The learned Chief Justice was inclined to rule in favor of defendant, but he allowed the evidence to go to the jury, reserving leave to defendant to move to enter a nonsuit, or a verdict for defendant on the first count.

For the defence Charles Scott was called as a witness. He proved a letter from Robert Scott to the plaintiffs, directing the appropriation of the proceeds of these securities; and on cross-examination said he was defendant's brother, and lived with him: that defendant told him, shortly after the bill fell due, that he had no notice, and that he had told the agent of the bank so, who said he supposed it was forgotten and left in the bank.

It was left to the jury to say whether the defendant made such an admission of liability or promise to pay as would amount to an admission of the receipt of notice of the dishonor of the bill, and they found a verdict for the amount of the bill and notes, the damages on each count being assessed separately.

*C. Robinson*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit or verdict for defendant on the first count, pursuant to leave reserved, or for a new trial generally, or as to the first count only, on the ground that the verdict on that count was contrary to law and evidence, and the weight of evidence, in this, that there was no sufficient evidence of a waiver by defendant of notice of dishonor to warrant a verdict for the plaintiffs on that count; or on the ground that under the pleadings no evidence of such waiver was admissible, and such evidence was improperly received at the trial.

*Carrall* shewed cause, citing *Burke v. Elliott et al.*, 15 U. C. R. 610; *Shaw v. Salmon*, 19 U. C. R. 512; *Jackson v. Collins*, 17 L. J. Q. B. 142; *Mills v. Gibson*, 16 L. J. C. P. 249; *Byles on Bills*, 8th ed. 281.

*C. Robinson*, Q. C., supported the rule, citing *Cordery v. Colvin*, 14 C. B. N. S. 374; *Borradaile v. Lowe*, 4 Taunt. 97; *Hicks v. The Duke of Beaufort*, 4 Bing. N. C. 232; *Standage v. Creighton*, 5 C. & P. 406; *Dixon v. Elliott*, *Ib.* 437; *Fletcher v. Froggatt*, 2 C. & P. 569; *Booth v. Jacobs*, 3 N. & M. 351; *Bank of British North America v. Ross*, 1 U. C. R. 199; *Ex parte Bignold*, 1 Deacon, 712; *Story on P. Ns.*, 4th ed., secs. 359, 363; *Earl of Macclesfield v. Bradley*, 7 M. & W. 570.

MORRISON, J., delivered the judgment of the court.

While we hesitate to say that there was no evidence whatever to go to the jury, if the learned Chief Justice had nonsuited the plaintiffs on the first count, or directed a verdict for the defendant, we would not have relieved the plaintiffs. The evidence, if any, is of so slight and unreliable a character, that if left to the jury it should be with a very strong charge to render a verdict for the defendant. No notice of dishonor in fact was attempted to be proved by the plaintiff, and it appears, upon the cross-examination of Charles Scott, called on the part of the defence, that the defendant asserted he had not received notice and that he so informed the bank agent, who in terms admitted that such was the case—so that in law the defendant was discharged from all liability on the bill.



Now, in such cases, when the plaintiff relies on a subsequent promise to pay or admission of liability, Mr. *Story* lays it down:—"The promise, to be obligatory, must be deliberately made, in clear and explicit language, and amount to an admission of the right of the holder, or of a duty and willingness of the indorser to pay; or, if it is implied from the conduct or acts of the indorser, it must as clearly import a like admission or duty, such, for example, as a part payment of the note."—*Story on P. Ns. sec. 363.*

In this case it appears that the bank had discounted two notes made by Robert Scott, and indorsed by the defendant, for \$1,000 and \$500, also the bill in question for \$1,000, drawn by defendant on Robert Scott. The two conversations given in evidence, and relied on by the plaintiffs as an admission by the defendant of his liability on the bill, referred to liabilities not specifically mentioned of the defendant and his brother to the bank. In the mind of the witness very probably this bill was included with the notes, as an existing liability against both of them, the defendant and Robert Scott; as against Robert, no doubt it was. On the first conversation the witness said the defendant appeared willing to pay; to pay what is not stated, whether the two notes and this bill or the two notes only. The witness negatived that the bill was mentioned, and stated that the defendant never made any promise relating to this bill particularly. At the second conversation, at Buffalo, when the three were present, the only expression used by the defendant having any bearing on the bill, and that only inferentially, was in reply to the question put by Robert Scott, (to whom it does not appear,) as to the amount for which security was required. Defendant said about \$4,000, an amount in which it appears, by a letter put in, Robert was *then* indebted to the bank.

In both of these conversations what the defendant said is quite consistent with an admission on his part as to the two notes merely, of which he had notice. In all the various cases through the books there is direct reference, when an admission of liability is relied on, to the particular bill or note in dispute. Here one is rather led to believe, from the

conduct of the agent of the bank with the defendant, that he shrank from pressing the defendant to a direct admission of his liability on the bill, being aware that he (defendant) was discharged by want of notice. As Lord *Denman* in a somewhat similar case remarked, (*Booth v. Jacobs*, 3 N. & M. 354,) "It is a slovenly way of doing business, to leave to inference that of which direct proof may easily be had."

We see no evidence on the learned Chief Justice's notes of a promise by defendant, and we are of opinion that there was not sufficient, if any, evidence to warrant the jury inferring that all the steps necessary to create a liability on the part of the defendant had been duly taken.

We think the most satisfactory way is to make the rule absolute for a new trial, as to the first count, without costs, unless the plaintiffs will consent to a *stet processus* as to the first count.

It may be said that as there was some evidence to go to the jury, the verdict ought not be set aside; but modern cases go to shew, and it is laid down in *Mellors v. Shaw*, (1 B. & S. 437,) that the doctrine that if there was only a scintilla of evidence for the jury the verdict is not to be disturbed, has been exploded.

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#### DENNISON V. KNOX.

*Plea of set-off—Equitable replication, assignment of the claim and notice to defendant.*

Defendant having pleaded a set-off to an action upon a covenant for the payment of money, the plaintiff replied on equitable grounds, in substance, that the deed declared on, and the moneys sued for, were before this action, and before the alleged set-off had accrued, duly assigned for value by the plaintiff to D., and by D. to B.: that defendant had notice of and assented to both assignments; and that this action is brought for B.'s benefit, the plaintiff being a nominal plaintiff only: that after the said assignments and notice thereof, B. sued defendant in the plaintiff's name on the same covenant for another breach, to which defendant pleaded *non est factum*, and a verdict and judgment were recovered against him, which he paid; and it is inequitable that he should now set up the defence pleaded.

*Held*, on demurrer, reversing the judgment of the County Court, Replication good.

APPEAL from the County Court of Huron and Bruce, from a judgment on demurrer.

*Declaration* upon defendant's covenant to pay the plaintiff \$200 and interest, and on accounts stated.

*Plea*, set-off, upon the common counts and on promissory notes.

*Replication*, on equitable grounds, that the deed in the declaration mentioned, and the moneys thereby covenanted to be paid to the said plaintiff and his assigns were, by a certain deed of assignment, dated the 27th of March, 1861, and before the commencement of this action, and executed by the said plaintiff on or about the said 27th of March, 1861, and before the accruing of the alleged set-off, or any part thereof, assigned, transferred and made over to one William Douglass, of the township of Morris, in the county of Huron, and his assigns, absolutely, for a valuable consideration, then paid by the said William Douglass to the said plaintiff; and that the said deed in the declaration mentioned and the moneys thereby covenanted to be paid to the said plaintiff and his assigns, including the moneys in the declaration mentioned, were, by a certain other deed of assignment, dated and executed by the said William Douglass on the 6th of April, 1861, bargained, sold, and assigned by the said William Douglass to Charles Burrows, of the township of Grey, in the county of Huron, absolutely, for a valuable consideration then paid by the said Charles Burrows to the said William Douglass, of which said first mentioned assignment the defendant had due notice immediately after the execution thereof, and expressed his concurrence in and assented to both of said assignments respectively, at the respective times of such notice; and that the said William Douglass and Charles Burrows had not, nor had either of them any notice or knowledge of any of the alleged matters of set-off in the said plea of set-off of the defendant mentioned before or at the time of such executing and payments respectively, or any or either of them; and that, on the said 27th of March, 1861, the said plaintiff, as the defendant then well knew, ceased to be, and the said Charles Burrows afterwards, on the 6th of April, in the year last aforesaid, as the defendant then well knew, became, and hath ever since continued, and now is, under



the said deeds of assignment, entitled to the said indenture of mortgage and moneys as aforesaid; and that this action is brought for the sole benefit of the said Charles Burrows, and not for the benefit of the said plaintiff, who is the beneficial plaintiff in this action, the name of the said plaintiff, Robert Dennison, being only used as a nominal plaintiff in this action on the covenant: that after the execution of the said deeds of assignment to the said William Douglass and from him to the said Charles Burrows, and after the said defendant had due notice thereof as aforesaid and assented thereto, and many months ago, an action at law was commenced against the said defendant on the said covenant in the name of the said Robert Dennison, but for the benefit of the said Charles Burrows, which the defendant well knew, for payment in respect of a former breach of the same, to which action the defendant pleaded on the record that he did not make the said deed by way of mortgage, nevertheless, a verdict was rendered for the plaintiff for the amount then claimed, and judgment was entered up for the plaintiff in the same, and execution issued thereon, which money the defendant then paid; and it is inequitable that the said defendant should now set up as a defence against the beneficial plaintiff herein the matters set forth in his said plea of set-off.

To this replication the defendant demurred, and judgment having been given in his favour, the plaintiff appealed.

*Robert A. Harrison*, for the appellant, cited *Ham v. Ham*, 6 C. P. 37; *Kingsmill v. Bank of Upper Canada*, 13 C. P. 600; *Cochrane v. Green*, 9 C. B. N. S. 448; *DePothonier v. De Mattos*, E. B. & E. 461; *Whitehouse v. Roots*, 20 U. C. R. 65, 78; *Bullen and Leake*, Prec. 2d. ed. 489.

*O'Connor*, contra.

HAGARTY, J. delivered the judgment of the court.

The point seems shortly this:—Defendant owes a sum of money to the plaintiff on a deed. Before any set-off arises in favour of defendant, the plaintiff, for value, assigns the debt secured by defendant's deed to a third person. Notice

of this is given to defendant. The latter, after such notice that the plaintiff has no further interest in the deed, chooses to give the plaintiff credit on other matters unconnected therewith, and buys up or takes notes on which the plaintiff is liable. The assignee of the debt in suing defendant has to use the plaintiff's name.

But for the judgment of the learned judge below, we should have thought it too plain for argument, that nothing could be more inequitable, or contrary to every day practice, than to permit a set-off acquired after notice of the assignment to be urged against the assignee for value, necessarily suing in the nominal plaintiff's name.

A different rule would at once put a stop to the numberless assignments of mortgage debts every day taking place. Long before equitable pleadings were permitted, it was the well known practice for a solicitor taking an assignment of mortgage to notify the mortgagor, (if he were not made a party,) or to obtain from him a recognition of the amount outstanding. The assignee of course took the assignment at the peril of the then state of the account between mortgagor and mortgagee, but such every day transfers would be utterly defeated if, after notice of the assignment, the mortgagor could be permitted to set up to the assignee's claim a subsequently acquired set-off against one who had ceased to have an interest. A court of equity would, we think, promptly interfere if required to prevent such injustice; and this seems to us precisely a case in which the Common Law Procedure Act permits the replying of the equitable matter to bar the unjust defence. On a bill filed, setting up the facts stated in this replication, we think the Court of Equity would grant an unconditional perpetual injunction against defendant setting up such a defence. No account would have to be taken, no terms imposed.

The appeal must be allowed, and judgment given in the court below against the demurrer.

Appeal allowed.

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## FAIRMAN V. WHITE.

*Ejectment—Notice of title.*

A defendant appearing in ejectment cannot be compelled to file a notice of his title; but if he does not he is precluded from setting up title in himself, and the plaintiff will recover on proving his own title.

*Jellett* moved to rescind an order made by *John Wilson, J.*, on the 10th of October, 1864, by which defendant was ordered to file a notice of his title and pay the costs of the application in ten days, and in default that the plaintiff might sign judgment as for want of a proper appearance. He cited *Shore v. McCabe*, 10 C. P. 26.

*Wallbridge, Q. C.*, shewed cause.

HAGARTY, J., delivered the judgment of the court.

The point is simply whether a defendant in ejectment is bound to file a notice of the nature of his intended defence, or whether he may not appear without so doing.

We consider the point settled by the judgment of the Court of Common Pleas in the case cited, where, after reviewing the operation of the act, the Chief Justice says, "If the defendant appeared without giving any notice it cannot be pretended that it would be an irregularity, far less that it would entitle the claimant to sign judgment. It would simply preclude the defendant from setting up title in himself. The claimant would still have to prove his title to the possession, which the appearance denies."

We presume this case was not brought to the notice of the learned judge in Chambers.

The order must be rescinded, and the judgment entered and proceedings had thereon be set aside.

Rule absolute.

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## BLETCHER V. BURN.

*Practice at Nisi Prius—Verdict subject to the opinion of the court—Replevin—Delay in prosecuting suit.*

A verdict cannot be taken subject to the opinion of the court without the consent of both parties.

In this case the plaintiff sued on a replevin bond, given for a vessel, and the defendant pleaded that he had prosecuted the action without delay. The judge directed the jury that on the evidence there was delay, and to find for the plaintiff, and he asked them to find separately the value of the vessel and its earnings. A verdict in accordance with this direction was then taken, subject to the opinion of the court as to the true measure of damages. Defendant's counsel not having assented to this course, moved against the verdict, and declined to argue the case when set down on the paper by the plaintiff.

*Held*, that the verdict must be set aside, and that no judgment could be given on the special case.

*Semble*, that the inability of the plaintiff's attorney in replevin to communicate with his client, not knowing where he was, affords no excuse for allowing two assizes to elapse; for it is the plaintiff's delay, not that of his attorney, which is a breach of the bond.

ACTION on a replevin bond dated the 1st of September, 1862, entered into by defendant and two others to the sheriff of Lincoln, in a penalty of \$10,000, subject to a condition that if defendant should prosecute his suit with effect and without delay against the plaintiff, for the taking and unjustly detaining the schooner *Jane Anne Marsh*, and make a return thereof, if a return should be adjudged, and if defendant should pay to the plaintiff such damages as the plaintiff should sustain by the issuing of the writ of replevin in that cause, in which the now defendant was plaintiff and the now plaintiff was defendant, if the now defendant should fail to recover judgment in that suit, and if defendant should observe all rules and orders made by the Court of Queen's Bench in that suit, then the bond should be void. General averment, that all conditions were performed, &c., &c., to entitle the plaintiff to a performance of the condition before the commencement of this suit, yet defendant did not prosecute the said action of replevin without delay according to the terms of the bond, whereby the same became forfeited to the sheriff, who duly assigned the same to the plaintiff; and the plaintiff claimed \$10,000.

*Plea*, that defendant did prosecute the action of replevin without delay.

The trial took place at the assizes for York and Peel, in October, 1864, before *John Wilson, J.*

It was proved that the replevin suit was commenced on the 1st of September, 1862, and the declaration was filed on the 21st of that month. Issues in fact were joined on the 26th of March, 1863, and issues in law on the 25th of August following, and judgment on demurrer as of Trinity Term, 1863.(a) Notice of trial was given on the 21st of October, 1863, for the 29th of October, at the city of Toronto. This notice was countermanded on the 26th of October, and nothing more was done before the 29th of February, 1864, on which day this suit was commenced. The plaintiff further proved the worth of the vessel, the probable value of her earnings from the time she was replevied by the now defendant for the residue of 1862, and her probable net earnings for 1863. Between the 30th of November, 1863, and the 29th of February following, she would earn nothing. On cross-examination the plaintiff said that before April, 1863, he had transferred his interest in the vessel.

On the defence, it was proved that the replevin suit was not tried in October, 1863, because the attorneys for the plaintiff in that suit (the now defendant) could not hear from their client; they never heard from him from the time the judgment on demurrer was given. No explanation was offered for not going to trial during the winter assizes. The defendant's counsel offered to prove that the now defendant filed a bill in Chancery to determine his rights in the vessel, and this was a reason for delay in proceeding in the replevin suit, as he had acquired a subsequent right to the vessel, rendering that suit in Chancery necessary. The learned judge rejected this evidence.

The learned judge directed the jury that there was delay, and that they ought to find for the plaintiff. He asked them to find separately; 1st, the value of the vessel; 2nd, the net earnings of the vessel from its being replevied until the 29th of February, 1864; 3rd, the earnings from October, 1863, till the close of that season; 4th, to find for the penalty of the bond, and damages within that penalty.

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(a) See Burn v. Bletcher, 23 U. C. R. 28.

The defendant's counsel objected that the question whether there was delay or not should have been left to the jury, and he did not consent to the damages being found as the learned judge had directed.

The jury gave a verdict for the plaintiff, damages \$10,000, and explained that they found the value of the vessel 5,500 The net earnings in 1862 and 1863.. ..... 4,500 The net earnings in November, 1863..... 500

The learned judge took the verdict subject to the opinion of the court as to the plaintiff's damages, the court to apply the true measure of damages. The defendant's counsel did not assent to this.

*Hector Cameron* obtained a rule calling on the plaintiff to shew cause why the verdict and assessment of damages should not be set aside, and a new trial had, on the following grounds:—That the verdict subject to the opinion of the court was rendered without the consent of the defendant, and the jury were not definitively directed as to the measure of damages; and for misdirection, in ruling that there was no matter of fact to be determined by the jury, and refusing to leave it to them to determine whether the replevin suit had been prosecuted without delay or with due diligence; for rejection of evidence to shew why the replevin suit was not proceeded with, namely, the evidence of Thomas Moss as to the suit, and as to the Chancery suit: that the damages assessed were uncertain and excessive: that the defendant had a good defence on the merits, which he was unable to offer owing to his own absence and that of the witnesses at the trial, and for reasons stated in affidavits filed: that the verdict was against law and evidence, and that the plaintiff on the evidence was not entitled to recover any damages, having sustained none, and having parted with his interest in the schooner before any delay had occurred in the replevin suit; and that there was no evidence of delay in prosecuting that suit. He cited *Sutor v. McLean*, 8 C. P. 205; *Caswell et al. v. Catton et al.*, 9 U. C. R. 462; *Gent v. Cutts*, 11 Q. B. 288; *Ch. Arch. Prac.* 11th Ed. 1091; *Tidd Prac.* vol. II., p. 1056.

*J. H. Cameron* shewed cause.



The plaintiff set the case down for argument in the paper upon the verdict taken as above stated, but the defendant's counsel refused to appear, contending that the proceeding was unauthorized.

DRAPER, C. J., delivered the judgment of the court.

The first question for consideration is, whether this verdict, taken without the consent of the defendant's counsel, subject to the opinion of this court, gives us authority to give any judgment which will bind the rights of the parties.

In *Dyer v. Cowley*, (12 Jur. 776, and 17 L. J. Q. B. 360) Lord *Denman*, C. J., is reported to have said, "We find it necessary to consider what is done at *Nisi Prius* when points are reserved for the opinion of a superior court, and the verdict is to be entered according to that opinion. The facts so found are in the nature of a special case submitted to the consideration of the judges, whose decision of the law thereupon arising will then become final in the case. This cannot be done without the consent of both parties at *Nisi Prius*, and either party, if not satisfied that this course will do justice according to law, is bound to withhold his consent, and require the facts to be ascertained by the proper tribunal, the jury. \* \* What the judge reports the parties to have agreed to must bind them."

The effect of this verdict, if it had been taken by the consent of both parties, would have been to refer to the court the determination what damages the plaintiff was entitled to recover, upon the assumption of certain facts which are taken as found by the jury, such as, the breach charged of delay, and the right of the plaintiff to the possession of the vessel during the periods for which the net earnings of the vessel have been computed. If the action of replevin had been brought to a conclusion, and a return of the vessel had been awarded, then the breach for not prosecuting with effect would have also been suggested, and the vessel not being returned, her value would have been recoverable. But it remains to be established whether the plaintiff is entitled to a return, and that question may be raised in the action of replevin.

A replevin bond does not fall within the Statute of Wm. III., for in *Middleton v. Bryan*, (3 M. & S. 155,) where the breach of the condition assigned was not making a return of goods distrained for rent, which was awarded after trial on an avowry, the court treated the bond as on the same footing as a bail bond to the sheriff, and held that the plaintiff, who was the assignee of the sheriff, might enter final judgment without executing a writ of inquiry.

I am not, as at present advised, disposed to extend the case of *Caswell v. Catton* any further. There were some peculiar circumstances in that case, and I should require more consideration than I have yet given to it to arrive at the conclusion that the inability of the attorney for the now defendant to communicate with his client as plaintiff in the replevin suit, because he did not know where he was, affords any excuse for suffering two assizes to elapse without bringing the suit to trial. It is delay and want of due diligence in the obligor, and not in his attorney, that constitutes the breach of the condition.

We think the rule for a new trial must be made absolute without costs.

The plaintiff set down the case for hearing on the paper as a special case. The defendant's counsel declined to argue it, insisting the whole proceeding was irregular. The same reason that renders it necessary to set aside the verdict applies against our giving judgment on this special case.

The case of *Bletcher v. Marsh et al.* is similar in all the circumstances, being an action on the same bond against the sureties of Burn, the defendant in the foregoing suit. We make the same decision in this also.

Rule absolute.

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## LEACH V. DENNIS.

*Dower—Statute of Limitations—Exchange.*

**DOWER.**—*First plea.* That the seisin of the husband was a seisin in law, and that he was seised upwards of forty years before this suit, and for upwards of that time before this suit the tenant, and those under whom he claimed, were in actual possession of the lands, claiming title adversely to the husband. *Held*, no defence, for though a dowress in one sense claims through her husband, yet the right claimed is one that first accrues, not to him, but to her on his death.

*Second plea.* That during the marriage, the husband agreed with one D. to exchange the lands in question with other lands, and in pursuance thereof, they by deeds “conveyed” the lands to each other, D’s wife barring her dower: that the demandant afterwards elected to take her dower in the other land, and by deed released the same to one C. *Held*, plea bad, as not shewing strictly an “exchange” of the lands, for the word *convey* has not the same effect, and *semble*, no other word can be substituted.

DOWER of the endowment of one Joshua Leach, heretofore demandant’s husband, who during the time he was her husband was seised.

*First plea.*—That the seisin of the said Joshua Leach in the said lands in the said declaration mentioned was a seisin in law, and that the said Joshua Leach was so seised upwards of forty years before the commencement of this suit, and for upwards of forty years before the commencement of this suit the said defendant, and those under whom he claimed the said lands, were in the actual occupation and possession of the said lands, claiming title thereto adversely to the said Joshua Leach, as the owner in fee simple of the said lands.

*Second plea.*—That long before the death of the said Joshua Leach, and while the plaintiff was the wife of the said Joshua Leach, the said Joshua Leach agreed with one John Dennis that the said Joshua Leach, being then the owner in fee of the said lands in the declaration mentioned, would exchange the said lands with the said John Dennis for lot number twenty-one in the first concession west of Yonge Street, in the township of York, of which last mentioned land the said John Dennis was then the owner in fee: that in pursuance of such agreement, by deeds bearing date respectively the 14th day of June, 1814, the said John Dennis conveyed the said last mentioned land to the said Joshua Leach, in fee, and the wife of the said John Dennis



joined in the said deed, and barred her dower in the said land last mentioned, and the said Joshua Leach conveyed the said land in the declaration mentioned to the said John Dennis in fee; and afterwards, and before the commencement of this suit, the plaintiff elected to take her dower in the said lot twenty-one, and by deed released the same to one Joshua Cummer.

The demandant demurred to each of these pleas.

*Appelbe* for the demurrer.

*J. H. Cameron*, Q. C., contra, cited *Bates v. Bates*, 1 Ld. Raym. 326; *Hooker v. Hooker*, Ca. Temp. Hardw. 13, S. C. 2 Barnard, 200; *Crabb R. P.* Vol. II., sec. 1129.

DRAPER, C. J., delivered the judgment of the court.

At common law a woman might be endowed of a seisin in law, "as when lands or tenements descend to the husband before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession." Co. Lit. 31*a*. Seisin in law is thus defined, "When after a descent the person on whom the lands descend has not actually entered, *and the possession continues vacant*, not being usurped by another." Co. Lit. 266 *b*, note 1.

The Consolidated Statute of U. C., ch. 84, sec. 2, provides, "When a husband hath been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced." This enactment confers on widows a right to dower in cases where it did not previously exist. It does not touch the question of right of dower founded on a seisin in law.

The count affirms the seisin of the husband; the plea admits it, qualifying the admission by stating that it was a seisin in law. Hence the demandant has an inchoate right

to dower confessed, which right could not become consummate until her husband's death. The right to bring this action did not accrue to any person through whom she claims, for though in one sense she claims through her husband, yet it is not any right which had first accrued to him which she seeks to enforce, but a right which first accrued to herself after his death. Though she is in partly by the act of her husband, she is also in partly by act of law. Brooke, Ab., *Feoffment al Uses*, pl. 10; Park on Dower, 102, 342. Though it is said that tenancy by dower doth work a degree because she is in by her husband.—Co. Lit. 239 a. But granting this, we cannot accede to the argument, that the forty years clause, (sec. 46, of ch. 88, Consol. Stat. U. C.,) has any effect on her right to bring this action, any more than the first clause of the same act, until the lapse of twenty years from the time that the right to bring the action first accrued to her. Such a construction of the statute would bar rights by dating its operation from a period when the right was yet incomplete, and when the person in whose favor it had begun to arise could not enforce it, whereas the policy of the statutes of limitations appears to be to compel persons who have complete rights, capable of being enforced, to enforce them, or to limit the time during which disability to enforce shall continue the right, but nowhere is it declared to be to extinguish an inchoate or incomplete right before it has so far matured as to enable the possessor of it to bring an action to enforce it.

The second plea raises the question whether the conveyances said to have passed between the demandant's husband and J. D. were deeds of exchange. That question must be determined by the description which the plea contains of these deeds. The only averment of operative words is that these parties each *conveyed* to the other, and the word "convey" has not the legal technical meaning assigned to the word "exchange."

The definition of an "exchange" of lands has not been altered, though there is an enactment that an exchange shall not imply any condition in law. According to the old authorities, no other word can be substituted for "exchange,"

in order to give the peculiar operation belonging to such a mode of conveyance, nor will any averment supply the want of it. In *Towsley v. Smith*, (12 U. C. R. 555,) many of the leading authorities are collected. I refer also to *Eton College v. Winchester*, (3 Wils. 468.)

We think there should be judgment for demandant on both demurrers.

Judgment for demandant.

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LEITH V. MARGARET FREELAND, EXECUTRIX OF PATRICK FREELAND.

*Bond to pay plaintiff's debt—When liability accrues—Equitable replication, plaintiff not damaged—Pleading.*

Where A. is liable to pay B. a certain sum on a particular day, and C. covenants with A. to pay it, A. on default may recover the whole sum from C. although he has paid nothing.

The plaintiff conveyed land to B. subject to a mortgage to one S., which contained a covenant to release in parcels. The plaintiff had previously sold to N. part of the land mortgaged, and B. agreed to release this part by a day named and pay off the mortgage as it should fall due. Defendant gave his bond to the plaintiff conditioned that B. should do this.

To an action on the bond, averring B.'s default in both respects, defendant pleaded, on equitable grounds, that the bond was given only to indemnify the plaintiff from damage by B.'s non-performance: that the plaintiff had not paid or been called upon to pay anything, and had suffered no damage: that the defendant was ready to indemnify him according to the true meaning of the bond, and that he ought not in equity to enforce it until he had been damaged.

*Held*, on demurrer, no defence.

*Held*, also, that such a bond was clearly within the 8 & 9 Wm. III.

In declaring upon a bond it is not necessary to allege it to be under seal.

DECLARATION that the testator by his bond, dated the 29th day of March, 1855, became bound to the plaintiff in the sum of £3,000, subject to a condition, whereby—after reciting that the plaintiff had conveyed certain land to one John Gordon Brown, subject to a mortgage by the plaintiff to Small for £900, payable in January, 1864, and interest half yearly, with clauses for releasing portions of the mortgaged land on payment of smaller sums, which mortgage the said Brown agreed with the plaintiff to pay off as and when payable: and further reciting that the plaintiff had



sold a portion of the mortgaged land to one Nichols, with an agreement by the plaintiff that in case he, the plaintiff, did not, by July 1863, discharge the portion so sold to Nichols from all moneys charged thereon by the mortgage to Small, that any moneys not exceeding £150 which Nichols might have to pay Small to get his portion discharged should be deducted from moneys payable by Nicholas to the plaintiff: and further reciting that Brown had agreed with the plaintiff that on or before the 1st of July, 1863, he would release the land conveyed to Nichols from the mortgage to Small, and pay such part of the principal moneys as might be requisite so to do on or before said day, and pay the residue and interest as and when the same should become payable; and that the testator, Freeland, had agreed to guarantee the performance by Brown of his said agreement—the condition of the bond was declared to be that if Brown did, on or before the 1st of July, 1863, exonerate and release the land so conveyed to Nichols from the mortgage to Small and all moneys charged thereon, and should pay by said day so much of the principal money secured by said mortgage requisite to be paid in order to exonerate it; and should also pay the residue of the principal moneys and interest in said mortgage as and when the same became due to the parties entitled thereto, then the bond to be void.

*Averment*, that the plaintiff by the mortgage to Small was to pay £900 by the 1st of January, 1864, and interest half yearly, and that he conveyed to Nichols and to Brown subject to such mortgage: that Brown, by the conveyance to him, agreed with the plaintiff to discharge the land conveyed to Nichols from Small's mortgage on or before the 1st of July, 1863, and pay the requisite portion of the principal money for that purpose, and to pay the residue of such principal and interest as and when the same should become payable.

*Breach*, that Brown did not by the 1st of July, 1863, exonerate the land so conveyed to Nichols from the mortgage to Small, and pay by said day so much of the principal money requisite in order to discharge the said land, but

made default, and the said money still remains unpaid. *Further breach*, that Brown did not pay the residue of the principal moneys and interest payable by the mortgage to Small as and when they became payable, but made default, and £800 and interest remains unpaid.

*Plea*, on equitable grounds, that the bond was made as a bond of indemnity, for the purpose of indemnifying and saving harmless the plaintiff from all loss and damage which the plaintiff might sustain or be put to on account of the non-performance by Brown of his covenants and agreements entered into by him as alleged: that the plaintiff has not been called upon to pay the mortgage moneys, or any part thereof, and has not paid the same, or any part thereof, and has not suffered any loss or damage by reason of Brown's non-performance: that defendant is and always has been ready and willing to save harmless and keep indemnified the plaintiff according to the true intent and meaning of the bond, and that till the plaintiff has paid the mortgage moneys, or some part, or been called on therefor, or been otherwise damnified by Brown's non-performance, he ought not in equity and good conscience to enforce the bond.

This plea the plaintiff demurred to. Defendant joined in demurrer, and gave notice of exceptions to the declarations, which are stated in the judgment.

*Trew*, for the demurrer, cited *Mease v. Mease*, Cowp. 47; 1 Wms. Saund. 117 *a*, note 1; *Hodgson v. Bell*, 7 T. R. 97, 99; *Holmes v. Rhodes*, 1 B. & P. 638; *Smith v. Howell*, 6 Ex. 739; *Lethbridge v. Mytton*, 2 B. & Ad. 772.

*Boyd*, contra, cited 1 Wms. Saund. 291, 291 *a*.

HAGARTY, J., delivered the judgment of the court.

We think it impossible to hold this plea to be a bar either legal or equitable.

The bond is conditioned for a third person doing certain acts and paying certain named sums by days named, which are past, in discharge and ease of the plaintiff, who was and is liable therefor. The guarantee of testator was

taken expressly for the plaintiff's protection from accruing liabilities, and to ensure his freedom therefrom by specified times. The moment these periods had elapsed without the acts being done or the payments made, the plaintiff's cause of action is complete.

If Brown had given a bond to the plaintiff with a precisely similar condition as to his own acts, it would be impossible to contend that the plaintiff could not recover against him for his default the entire sums agreed to be paid by him, or that the plaintiff must delay his suit till he had himself actually paid what Brown should have paid. Freeland, who gave his bond conditioned for Brown's acts and payments, cannot be in any better position.

We think the law to be perfectly clear, that when a plaintiff is liable to another for moneys payable on a future day, and a third person for good consideration covenants that on or before that or any other named day he will pay the money, the plaintiff on his default is entitled to recover the whole amount from him, and is not bound to wait till he has paid the same.

We refer to *Lethbridge v. Mytton*, (2 B. & Ad. 772,) *Rawle on Covenants*, 357.

The defendant objects to the declaration that testator's bond is not alleged to be under seal. We think it sufficiently stated, and that when a man is alleged to engage by bond or covenant the law intends his seal to be thereto. In *Bullen and Leake's precedents* the form accords with the plaintiff's allegation.

It is also objected that the bond is not within the statute 8 & 9 Wm. III., ch. 11, and that the declaration is bad for assigning several breaches.

We do not think the objection tenable. We think the bond clearly within the statute, and refer to *Gainsford v. Griffith*, 1 Wms. Saund. 58-61; *Roberts v. Mariett*, 1 Wms. Saund. 187.

We think the plaintiff is entitled to judgment.

Judgment for plaintiff on demurrer.



## ELMORE V. HIND.

*Agreement to edit a magazine—Construction—Pleading—Written agreement  
Allowing absence—Collateral stipulation as to time of return—Pleading.*

The first count alleged that the defendant agreed under seal with the plaintiff to edit a magazine owned by her, on certain terms specified, but that he refused to continue as such editor, whereby she was forced to discontinue the publication. Defendant pleaded that before any breach of his agreement the plaintiff, finding the magazine did not pay, ceased to publish it, whereby he was prevented from acting as editor, although he was ready to do so. *Held*, clearly a good defence.

In another count the plaintiff alleged that, although defendant was allowed by mutual agreement, to absent himself until the 27th of January, 1864, yet he did not after that day return to his duties as editor. To this defendant pleaded, that before any breach, by a memorandum under seal between him and the plaintiff, it was agreed that defendant should go to Europe to try and sell the magazine, and that during his absence the editorial department should be provided for by the plaintiff: that it was no where stipulated in such agreement that defendant should return by the 27th of January, or any other day: that he was necessarily absent on such journey until March following, and on his return was ready to resume his duties, but before his services were required the plaintiff discontinued the publication. *Held*, on demurrer, a bad plea, for it was not averred that the agreement pleaded contained the whole contract as to defendant's absence, and there might have been a collateral independent agreement that he should return by a specified day.

*First count.*—That the defendant by deed, dated the 18th of February, 1863, agreed with the plaintiff to become editor of a magazine, entitled *The British American Magazine*, of which she was the proprietress, for the period of one year at least, at \$66.66 a month, to be paid ten days after the issue of each monthly number, and to supply at least twenty pages of his own original matter for each issue of the magazine, except in cases to be mutually agreed on, and to continue in the said capacity for a second year, on the same terms of payment and otherwise, unless he should, two months before the expiration of the first year, express by written notice his intention of discontinuing so to act at the end of the first year, or should give notice of his intention to continue so to act for another year, but should express therein a desire to become a joint proprietor with the plaintiff of the said magazine, with a half interest, which he should have the option of doing in lieu of being paid by salary. And the plaintiff avers that the said magazine was duly established, and the first number issued on or before the 1st of May, in the year last aforesaid, and the defendant,

after the said agreement, and before the said day, entered upon the duties of the said office of editor of the said magazine, and continued in that capacity for the said first year; and although the said first year expired long before the commencement of this suit, and the said defendant did not, two months before the expiration of the first year, by a written notice, express his intention of discontinuing so to act, and his desire to become a joint proprietor with a half interest, the said defendant hath not, since the expiration of the first year, continued to act as editor of the said magazine, but, on the contrary, he has wholly neglected so to do, and hath not supplied twenty pages at least, or any number of pages, of his own original matter for each issue of the said magazine since the said first year—by reason whereof the said plaintiff hath been greatly injured and damnified, and has been put to great expense, and been forced and obliged to discontinue the publication of the said magazine, and has lost the benefit, advantages, and profits that she would otherwise have derived from the publication of the said magazine.

*Fourth count.*—That the defendant, by deed bearing date the 18th of February, 1863, agreed with the plaintiff to become and act as the editor of *The British American Magazine*, which the plaintiff was about to establish, for the period of one year at least, at a salary or allowance of \$66.66 per month, to be paid ten days after the issue of each number; and the defendant thereby agreed also to supply at least twenty pages of his own original matter for each issue of the magazine, except in special cases to be mutually agreed on. And the plaintiff avers that although the defendant did enter upon his duties as such editor, and discharged the same up to the 9th of December, 1863, and although by mutual agreement between the plaintiff and defendant, the defendant was excused and to allowed absent himself from those duties until the 27th of January, 1864, yet the defendant did not, on or after the said 27th day of January, in the year last aforesaid, return to his duties as such editor, or perform the same during the residue of the said year, and did not nor would supply twenty pages of his own original

matter for each issue of the said magazine during the said year after the 27th of January in the year last aforesaid, or any number of pages; and the plaintiff avers that there was no special case mutually agreed on, exempting him from supplying such original matter for the said magazine after the said 27th day of January, aforesaid—whereby the plaintiff was put to great damage and expense, trouble and inconvenience, in procuring and furnishing matter for the said magazine, and lost the benefit of the defendant's services during the residue of the said year, contrary to his said agreement.

*Second plea*, to the first count, that at the expiration of one year from the first publication of the said magazine, in the said first count mentioned, and before the commencement of the second year thereof, and before any breach of covenant on the part of the defendant as alleged in the said first count, the plaintiff finding that the said magazine would not pay, and having no money or means of her own for continuing it other than the subscription list of said magazine, wholly discontinued the publication thereof, and never afterwards published the same, or any number thereof, whereby the plaintiff was prevented from acting as editor of said magazine during the said second year, although he was always ready and willing so to do.

*Seventh plea*, to the fourth count, that after the making of the deed in the said count mentioned, and before any breach of covenant on his part, as in said fourth count alleged, to wit, on the 9th of December, 1863, by a certain memorandum of agreement of that date, under the respective hands and seals of the plaintiff and defendant—after reciting that it had been agreed between them that endeavours should be made to effect a sale of the said *British American Magazine* in Europe, and that with that view it had been arranged that the defendant should forthwith proceed to Europe, and use his best exertions for that purpose in London, and in other cities and towns in Europe—it was agreed, amongst other things, that the defendant should proceed accordingly to Europe, and make such efforts to effect a sale at such place or places, city or cities in Europe,



of the said magazine as he should deem advisable, and on such terms as to him should seem reasonable and just, keeping in view the prosperity and well doing of the said magazine; and it was thereby further agreed between the plaintiff and the defendant that during the absence of the defendant on said trip to Europe, the editorial department of the said magazine should be conducted, managed, and provided for by the plaintiff. And the defendant further saith that it is no where provided or stipulated in said memorandum of agreement that the defendant should return to Canada from said trip, and to the conducting the editorial department of the said magazine, on or by the 27th of January, 1864, as in the said fourth count mentioned, or on or by any other specified day or time. And the defendant avers that after the execution of the said memorandum of agreement of the 9th day of December aforesaid, he did forthwith proceed to Europe, to endeavor to effect the purpose in the said agreement provided for as aforesaid, to wit, a sale of the said magazine in London and other cities and towns in Europe, and was necessarily absent on such journey, and in making such reasonable efforts as aforesaid, and in the returning to Canada, from the said 9th of December until the month of March following; and that the said interval of his absence was only a reasonable time for the purpose aforesaid, and no more. And the defendant further saith, that on his said return he was ready and willing to have re-commenced his duties as editor of the said magazine during its publication, according to his said agreement in that behalf, but the plaintiff thereupon, at the end of the said month of March, or beginning of the month of April following, and before the services of the defendant as such editor could be or were required after his said return, and before any breach of covenant on his part, as alleged, determined to discontinue, and did in fact wholly discontinue the publication of the said magazine, and never afterwards published the same, or any number thereof, after the said first day of April, whereby the defendant was prevented by the plaintiff from further performing the duties of such editor.

The plaintiff demurred to each of these\*pleas.

*E. W. Hurd* for the demurrer, cited *Tay. Ev.* 1st Ed. secs. 818, 825.

*Robert A. Harrison*, contra, cited *Thornhill v. Neats*, 8 C. B. N. S. 831; *Kenyon v. Tayleur*, 8 Ir. C. L. Rep. App. 77; *European and Australian Royal Mail Co. v. The Royal Mail Steam Packet Co.*, 10 C. B. N. S. 860.

HAGARTY, J., delivered the judgment of the court.

We cannot understand why the plea to the first count should not be considered a complete bar if true. The plaintiff owned the magazine, and before any breach of agreement on defendant's part chose to wholly discontinue the publication. Why the defendant, after such an act on the plaintiff's part, should be held answerable for not continuing to furnish matter, and to edit a magazine that by the owner's act had ceased to exist, is quite beyond my comprehension.

The demurrer to the second plea to the fourth count raises a far more serious objection.

The count, after setting out the agreement to edit and furnish original matter to the plaintiff's magazine, and a continuance to perform such duties by defendant till December, 1863, sets up an agreement (not said to be in writing) between the parties, that defendant might absent himself from his duties until the 27th of January following, yet that defendant did not, on or after the said 27th of January, return to his duties as editor, or supply the original matter during the residue of the year, whereby the plaintiff was put to great trouble and expense, and lost the benefit of defendant's services for the residue of the year, contrary to the agreement.

To this defendant pleads, that after the making of the original agreement between the parties for the editing of the magazine, and before any breach of covenant by defendant, it was agreed in writing under seal between the parties that defendant should proceed to Europe to endeavor to sell the magazine, and that during his absence the plaintiff

should provide for the editing of the magazine: that it was in no way provided by that agreement that he should return by any specified day: that defendant did proceed to Europe, and employed himself for such purposes from December till March following, which was only a reasonable time for the purpose, and no more: that on his return he was ready to resume his duties as editor, according to agreement, but the plaintiff, at the end of March or beginning of April following, before defendant's services as editor could be or were required after his return, and before any breach of covenant on his part, discontinued the publication of the magazine, whereby defendant was prevented from acting as editor, &c.

The objection to the plea is, in substance, that while the count charges a contract by defendant to return to and resume his duties by the 27th of January, the plea sets out a sealed agreement, providing for defendant's absence on a specified purpose, and declares that such agreement contains no stipulation for his return by any specified day. It does not assert that such agreement contained the whole of their contract as to defendant's absence, nor that no other contract as to his going or returning existed except under that written agreement.

It may have been that, collateral to or independent of the written contract in the plea, there was an agreement as to returning by a specified day. It does not follow that because there was a written agreement relating to defendant's absence, silent as to his return by a day named, this latter term may not have been provided for otherwise.

The case of *Lindley v. Lacey*, decided last month, (11 L. T. N. S. 273, C. P., 10 Jur. N. S. 1103,) is in point, and decides that where there is a parol agreement, and a subsequent written agreement which does not embrace all the terms of the parol agreement, it is a question of fact for a jury whether it was the intention of the parties that there should be a distinct parol agreement collateral to the written agreement. Sir *W. Erle* says, "If a jury find that there was intended to be a distinct collateral agreement besides that in writing, the law



does not interfere to prevent its taking effect. \* \* If the written agreement had been got ready, and the paper containing it had been produced, and defendant had said, 'In consideration of your signing this I will stop Chase's action,' " (which was not mentioned in the agreement in writing,) "he would have been unquestionably bound to stay it."

We think that the plea is defective, and that judgment should be for the plaintiff on demurrer thereto, and for the defendant on the first demurrer.

Judgment accordingly.

## SECOND AND THE CORPORATION OF THE COUNTY OF LINCOLN.

*County by-law—Extraneous objections—Refusal to quash for—Capitalizing property in towns at ten instead of six per cent—Consequent error in assessment rolls—By-law to authorise loan—Uncertainty in payment of debentures, &c.*

Where errors in computation only are shewn in a by-law, though extensive, the court will lean strongly to support it, especially where it has been acted upon, and where a previous ineffectual application to quash it has been made upon other objections.

Grierson v. The Municipality of Ontario, 9 U. C. R. 623, affirmed, as to the extent to which the court is bound to give way to objections not apparent on the face of a by-law.

Where it appeared that the county council, in equalizing the assessments under section 70 of "The Assessment Act" had intentionally capitalized the personal property in towns and villages at ten per cent., instead of six, contrary to the express direction in section 32, the court refused to quash the by-law on motion, though they intimated that it might be held insufficient if relied upon for protection.

It was also objected that by this course the amount of ratable property in towns and villages was made much greater than it should have been, and so (in effect) that the amount shewn by the last revised assessment rolls, followed in the by-law, was wrong; but, *Held*, that on this application the court clearly could not go behind the rolls.

The by-law provided for raising \$22,500, and authorized the issue of debentures payable in from one to ten years, with interest half-yearly, but no greater sum than \$3,200 to be payable in any one year; and it imposed a special rate of half a mill in the dollar, in addition to all other rates, until the debentures and interest should be paid in full. This was objected to as not shewing when or in what proportions the debt or debentures were to be payable, or how much each year; but, *Held*, good, for the rate not being unequal or insufficient, it was a matter of calculation so to make the debentures payable that it would meet the principal and interest falling due in each year.

J. H. Cameron, Q. C., obtained a rule *nisi* calling upon the corporation of the county of Lincoln to shew cause why

their by-law to raise by way of loan the sum of \$22,500, for the purpose of erecting a new county gaol, should not be quashed, with costs, on the following grounds:—

1. That the ratable property of the said county of Lincoln, according to the last revised assessment rolls when the said by-law was passed, was much larger than the sum of \$6,434,773, stated in the said by-law, and that the said sum is untruly stated.

2. That in capitalizing the real property not actually rented, but held and occupied by the owners thereof, and also in capitalizing the ratable personal property in the towns of Saint Catharines and Niagara, and the incorporated village of Port Dalhousie, the council of the said county illegally capitalized the same at ten per cent., instead of at six per cent, as directed by law.

3. That if the said ratable real and personal property in the second ground of objection herein mentioned were capitalized at six per cent., instead of at ten per cent., the said ratable real and personal property would have amounted to upwards of \$500,000 more in actual value than is recited in the said by-law.

4. That if the said ratable personal property of the said towns and village were capitalized at six per cent., it would have amounted to upwards of \$200,000 more in actual value than recited in the said by-law.

5. That at the time the said by-law was passed, the said county council had not examined the said assessment rolls, nor equalized the same, and therefore could not impose any rate.

6. That by capitalizing the said ratable real property, not rented and the said ratable personal property at ten per cent., instead of six per cent., a larger sum must be levied and raised under the said by-law on the ratable property in the several townships of the county than should be imposed upon them, and a much less proportion on the said towns and village.

7. That it does not appear by the said by-law at what times and in what proportions the debt created by, or the debentures to be issued under the said by-law, is or are to

be payable, and whether the debt is to be made payable in equal amounts during the ten years from 1864 to 1873, both inclusive, or in unequal amounts.

8. That the amount to be raised in each year for principal and interest is limited to \$3,200, and yet the warden is authorized to issue debentures to the extent of \$3,200, payable in any year, which would be in excess of the provision made for their payment, as \$3,200 only is provided annually for the payment of both principal and interest of the debentures.

9. That it does not appear by the said by-law at what times and in what amounts the debt created by the said by-law is payable, and that therefore it cannot be ascertained therefrom that the special rate directed to be levied is sufficient to discharge the debt and interest when the same are respectively payable, and if it be assumed that the said debt is distributable in equal proportions over the ten years mentioned in the by-law, the sum of \$3,200, directed to be levied annually is not sufficient to discharge the debt and interest payable in each of the ten years.

10. That as the debentures and debt are to be paid in annual amounts, a distinct special rate should be imposed in the by-law for the payments of each year, and not the same general rate in all the years, as such general rate must necessarily produce too little in some years, and too much in others.

11. That the amount per cent. for the annual sinking fund is not stated in the by-law.

The by-law will be found sufficiently set out *ante*, page 17, in the report of a previous motion to quash it, made on behalf of a different applicant.

The Assessment Act (Consol. Stat. U. C., ch. 55, sec. 70) requires county councils every year, before imposing any county rate, to examine the assessment rolls of the townships, towns and villages, for the preceding financial year, to ascertain whether the valuation made by the several assessors in their own townships, &c., bears a just relation to the valuation made in all the townships, &c., and they may, for the purpose of county rates, increase or decrease the aggre-



gate valuations of real property, by adding or deducting so much per cent. as may in their opinion be necessary to produce a just relation between all the valuations of real estate in the county.

The affidavit in support of the rule stated that no such examination took place before this by-law was passed, though it imposed a rate, for it was passed on the 15th of March, 1864, and the examination took place on the 4th of May, 1864.

The by-law recited that the amount of the whole ratable property of the county, "according to the last revised assessment rolls of the said county, and the several towns, townships, and incorporated villages thereof, being for the year 1863," was.....\$6,434,773

The applicant, Secord, swore, that on the 4th of May, 1864, the council, by resolution, settled the actual value of the township municipalities for county rates at the sum of... ..\$4,430,005 and of the towns and village municipalities at..... 2,022,650 \$6,452,655

This would make a difference amounting to... 17,882 between the value stated in the by-law, and that settled by the resolution :

That the annual value of the ratable real and personal property being, as was stated in the affidavit, \$200,517, in the towns and village, was capitalized by the county council at ten per cent., which the council erroneously computed at \$2,022,650, instead of \$2,005,270, and that the council made no distinction between the annual value of real property when rented and when not rented, and the annual value of personal property, but capitalized all at ten per cent., though a large part of such real property was occupied by the owners, and was not rented, amounting in annual value to one-third of the whole ratable real property of the said towns and village.

(This was admitted to be true so far as respected the capitalization of all at the rate of ten per cent., by the affidavits filed in reply, which, however, said nothing as to

the proportion of real estate rented to tenants or occupied by the owners.)

That the annual value of the real and personal property in the towns and village, capitalized at six per cent, produced \$3,341,949: that the annual value of the same real property only capitalized at ten per cent., produced \$1,641,700; and the annual value of the same personal property only capitalized at six per cent., produced..\$ 605,950 which, added to the above stated value of real property..... 1,641,700

makes a total value of.....\$2,247,650

as the true ratable value of towns and village property, instead of.....\$2,022,650:

That the clerk of the county council made a return to the auditor-general of the actual value of the real and personal ratable property of the said towns and village, according to the last revised assessment rolls for 1863, making the actual value \$3,138,875:

That no by-law had been passed by the county council, directing what portion of the said sum of \$22,500 in the said by-law mentioned, or of the interest thereof, should be levied in each of the townships, towns, or incorporated villages.

The foregoing facts were the foundation of the first six objections in the rule. The remaining objections arose upon the face of the by-law, the form of which, so far as it is material to the points taken, is sufficiently stated in the judgment.

*Robert A. Harrison* shewed cause, citing *Gibson and The Corporation of Huron and Bruce*, 20 U. C. R. 111; *Hill and The Municipal Council of Walsingham*, 9 U. C. R. 310; *Grierson and The Municipal Council of Ontario*, Ib. 623; *Sutherland and The Municipal Council of East Nissouri*, 10 U. C. R. 626; *Cameron and The Municipality of East Nissouri*, 13 U. C. R. 190; *Hodgson and The Municipal Council of York and Peel*, Ib. 268; *Standley and The Municipality of Vespra and Sunnisdale*, 17 U. C. R. 69; *Sells and The Municipality of St.*

Thomas, 3 C. P. 286; Michie and The Corporation of Toronto, 11 C. P. 379.

*J. H. Cameron*, Q. C., contra, cited Consol. Stats. U. C. ch. 54, sec. 223; ch. 55, secs. 10, 19, 28, 29, 32, 70, 72, 73, 75, 89.

DRAPER, C. J., delivered the judgment of the court.

I agree with what is said by *Burns*, J, in *Grierson v. The Municipality of Ontario*, (9 U. C. R. 632,) as to the extent to which the court is bound to give way to objections which may be made to the legality of by-laws which depend upon extraneous matter; and where errors in computation only, even although extensive, were shewn, (the good faith in which the council were seeking to execute the powers given them being unquestioned,) I should lean *totis viribus* to support their by-law, and especially where it had been acted upon, money raised, or debentures issued under it, or rates voluntarily paid or collected and levied by compulsory process. In the words of my late brother *Burns*, "I am of opinion that the true construction to give to the powers vested in the court to quash by-laws is, that unless the by-law be illegal on the face of it, it rests discretionary with the court upon extraneous matters to say whether there is such a manifest *illegality* that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained."

In the present case, too, after an ineffectual application to quash this particular by-law, and when the objections now urged existed just as they now exist, and were not advanced, I should feel the strongest reason for disregarding such objections, and leaving parties to ulterior remedies. I may not place unbounded reliance in the sincerity of those who partly ground themselves on the objection that the by-law operates to tax themselves too little and the rate-payers in the townships too much, nor am I concerned with the motives inducing these applications; and were it not for one consideration I should, so far as any of the foregoing objections are concerned, have hesitated little in discharging this rule.

But I find in one of the affidavits filed in answer to



this rule, a statement not merely confirming the objection that the council have, in capitalizing personal property in the towns of Saint Catharines and Niagara, and the incorporated village of Port Dalhousie, capitalized the same at ten per cent., instead of at six per cent., but that they justify this course for reasons assigned, which in themselves must be insufficient, since this action is in direct contravention of the 32nd section of the assessment law. This statement is as follows: "In consequence of the property of the different townships being assessed very low, the assessment committee have always considered it but fair and just towards the towns, in equalizing the assessment, to capitalize the whole property, both real and personal, at ten per cent., instead of reducing the amount in the towns and adding to the townships, as provided by the seventieth section of chapter fifty-five, of the Consolidated Statutes of Upper Canada."

I notice this, and a statement of a similar character in the affidavit of the clerk of the County Council, in order to say that in thus setting at naught the directions of the Assessment Act, the County Council are incurring a very serious risk, and are exposing all those who may require to appeal to any of their by-laws affected by this objection for protection for some act done under it, to the danger of finding themselves exposed to damages, and without protection or indemnity.

But it is a different question, as has been frequently pointed out, whether the court should exercise the summary jurisdiction conferred by the Municipal Institutions Act, upon objections not apparent on the face of it.

The 223rd section of the Municipal Institutions Act applies to this by-law, and enacts that no such by-law shall be valid which is not in accordance with certain restrictions and provisions. Among them (3) the by-law shall settle an equal special rate per annum to be levied in each year, which (4) shall be sufficient according to the amount of ratable property *appearing by the last revised assessment rolls* to discharge the debt and interest when respectively payable. (6) The by-law must recite, among other things, the amount of the whole ratable property of the municipality *according to the last revised assessment rolls*.

Now, so far as I see, this is complied with substantially. We treated the difference between the two sums \$6,434,773, the sum mentioned in the by-law, and \$6,452,655, the sum settled on when the assessment rolls were examined and settled, as a miscomputation too small to require serious notice, when the rate to be imposed was half a mill in the dollar, and no objection is now raised on that ground. These objections strike at the amount as shewn by the last revised assessment rolls, insisting that these rolls, so far as regards the towns of Niagara and St. Catharines, and the village of Port Dalhousie, are wrong, and insisting that the present by-law is illegal because it adopts them. The contention then amounts to this:—if they can shew the amount to be wrong, then, though it is the amount according to the last revised assessment rolls, the present by-law is illegal. If the recital in the by-law did not follow those rolls, but contained the amount arrived at by Mr. Secord's affidavit, then the objection, no doubt, would be, that the last revised rolls were not followed, an objection more likely to be fatal, because then the by-law would not comply with one of the statutory requirements. I am clearly of opinion that we cannot go behind the revised assessment rolls, even if, on this summary application, we can go to them.

In my opinion these objections fail.

Those which remain are to the contents of the by-law, the grounds not being derived from proof of extraneous matter.

The by-law, after its recitals, provides:—

1. For borrowing on debentures \$22,500 for the purpose recited.

2. It empowers the Warden to issue any number of debentures for any sums not less than \$400 each, declaring that no greater sum than \$3,200 shall be payable in any one year.

3. Such debentures to be made payable "from one to ten years from the 31st of March 1864," with coupons attached for the interest.

4. The debentures are to bear interest at six per cent. per annum, payable half yearly, on the 30th of September and 31st of March in each year.

5. It imposes a special rate of half a mill in the dollar on all the ratable property in the county, in addition to all other rates, until the debentures and interest are fully paid.

It is true, as stated in the seventh objection, that the by-law does not fix the times nor the proportions in which the debentures are to be made payable, nor whether the debt is to be payable in equal or unequal amounts during the ten years, but it does not follow that the by-law is therefore illegal. It does expressly provide that not more than \$3,200 shall be payable in any one year, and it imposes a special rate to be levied until principal and interest are paid. On the recited value of all the ratable property, \$6,434,773, this rate will yield \$3,217 per annum. If the value of the ratable property is greater, so will be the produce of the special rate.

The by-law does not make it necessary that one-tenth or any specific proportion of the principal shall be made payable in the first year. A less proportion than one-tenth may be made payable in each of the earlier years, and may be gradually increased as the amount of interest payable gradually diminishes, and thus the sum raised by the fixed annual rate will in ten years meet the whole of the debentures and interest. The Warden must so exercise the power given to him to issue debentures, as to meet all the interest in the first year, and only so much of the principal as the amount of the special rate, less such interest, will cover. It is a matter of calculation, and I suppose not very difficult, so to arrange the time at which the several debentures shall be made payable. If the Warden issues debentures without reference to the special rate, he will violate the second section of the by-law, which expressly provides that no greater *sum* than \$3,200 shall be payable in any one year. The word "sum" is large enough to include principal and interest, and therefore it points out that the debentures are to be so prepared that this sum of \$3,200 shall be sufficient to meet both principal and interest falling due in each year.

If the amount of the special rate was unequal or plainly



insufficient, and so illusory, the objections would assume a substantial character, calling probably for our summary interference, but this is not urged, and certainly no facts leading to that conclusion are stated in Mr. Secord's affidavit. Indeed, there are no direct statements of fact to support either the 7th, 8th, 9th, or 10th, objections. The court is in effect asked to make calculations in order to arrive at the results those objections suggest; and for the purpose of one, at least, (the 8th,) we must assume that one-tenth of the principal will fall due in the first year, and therefore that the special rate will be insufficient.

I have looked at every section of the Assessment and of the Municipal Institutions Acts to which we were referred by Mr. Cameron. I do not find that they sustain the 7th and 9th objections by making it necessary that the by-law should contain those particulars the absence of which is pointed out by those objections; nor do I find in those sections that it is necessary for the council to impose a distinct special rate for each year, as the 10th objection suggests. The sixth sub-section of section 223, of the Municipal Institutions Act requires a recital of an annual special rate in the dollar for paying the interest and creating a sinking fund for paying the principal; but the 11th objection, that the "amount per cent. of the annual sinking fund is not stated in the by-law," does not appear to me to be sustained by this sub-section, nor by any other part of the statute which was referred to.

It must not be forgotten that we are dealing with the by-law as it stood when passed. Subsequent matters are alluded to in some of the affidavits, as to what has not been done or not intended. With these we have no concern.

On the whole, I do not feel warranted in dealing with this by-law as illegal. I am not deciding that it is proof against all exceptions, or that when it is attempted to carry out its provisions there may not be difficulties to overcome. Those who may be applied to to advance money on the debentures will for their own sakes look to this, for our refusal to quash the by-law involves no such ulterior questions. Still, I will repeat the warning, that for the

future the council will act wisely not to substitute their own ideas of what the law should be in place of what it is, in regard to making the valuation of ratable property in each township, &c., bear a just relation to the valuation made in all.

We are of opinion this rule must be discharged with costs.

It is not without difficulty that we have made up our minds to this conclusion, but considering this is the second application against the by-law, we have confined our attention strictly to the objections that are now taken. And we wish further to observe, that the corporation will do well to consider whether the lapse of time during which, as we understand, nothing has been done to carry it into effect, will not render necessary some further legislation to get over obstructions not presented for our consideration.

HAGARTY, J.—I have come to the same conclusion as the learned Chief Justice, but not without the greatest possible difficulty and hesitation.

MORRISON, J., concurred.

Rule discharged.

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IN THE MATTER OF HENRY MACDERMOTT, AN ATTORNEY,  
IN THE MATTER OF THE REFERENCE BETWEEN CHARLES  
WIDDER AND THE BUFFALO AND LAKE HURON RAILWAY  
COMPANY.

*Consol. Stats. C., ch. 66, sec. 11, subsecs. 12, 13—Costs of arbitration—Taxation of.*

Costs of an arbitration under "*The Railway Act*," sec. 11, can be taxed only by the County Court Judge; and the introduction in the bill of charges for business done in this court auxiliary to the arbitration, such as procuring an order for the attendance of witnesses, will not authorize a reference to the Master.

*Quære*, whether such order can properly be granted in these arbitrations.

C. Robinson, Q. C., obtained a rule *nisi* to rescind an order made by John Wilson, J., in Chambers, on the 5th of October last, directing that Mr. MacDermott's bill of

costs, delivered to the railway company, should be referred to the Master of this court to be taxed, on the grounds that "*The Railway Act*" provides for the taxation of such bill, if necessary, by the judge of the county court of the county in which the lands in question in such reference lie, and that therefore, and because the said bill contains no taxable items, and the submission under which the said reference took place has not been made a rule of court, the Master, to whom the taxation thereof is referred by such rule, can have no jurisdiction over the same; or why the said order should not be set aside on the said Henry MacDermott waiving any charges of a taxable nature contained in such bill.

An arbitration had taken place under "*The Railway Act*," in pursuance of the judgment of this court, reported in 23 U. C. R. 208, to determine the compensation to be paid to Mr. Widder for damage to his land, injuriously affected by the construction of the railway, and an award had been made in his favor for \$10,000, the validity of which the company disputed, alleging that they had desisted from their notice of arbitration, under sec. 11, subsec. 16, of the statute. They admitted their liability to pay costs under this notice, while Mr. Widder, on the other hand, contended that the award was good, and that he was entitled to costs under subsec. 12 of the same section, and an action on the award was pending by him against the company for the sum awarded and costs.

The bill of costs attending the reference and arbitration, which had been served upon the company, contained charges for making an affidavit and procuring an order thereon in this court, under sec. 180 of the C. L. P. Act, to compel the attendance of certain witnesses at the arbitration. The learned judge held that these being taxable items drew with them the rest of the bill, and authorized a reference of it to the Master, notwithstanding the provision in subsec. 12, above referred to, under which it would otherwise have been taxable only by the county court judge.(a)

*Robert A. Harrison* shewed cause. He argued that the

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(a) This sub-section enacts that if the sum awarded is not greater than that offered, the costs of the arbitration shall be borne by the opposite party, but if otherwise, by the company, "and in either case they may, if not agreed upon, be taxed by the judge aforesaid."



introduction of these taxable items authorized a reference to the Master under the general jurisdiction of the court, which was not excluded by the clause relied on, the enactment being only that such costs "*may*," not *shall*, be taxed by the judge; and that the waiver of taxable items should have been made, if at all, in Chambers, and could not now be treated as a ground for pronouncing the order wrong.

*C. Robinson*, Q. C., contra, contended that the statute clearly contemplated a taxation by the judge of the county in which the arbitration might take place, as being the most convenient and least expensive course; that these charges, being for services in connection with the reference, even if taxable items could not be allowed to defeat the plain intention of the act: that without the enactment the costs of these arbitrations could not have been taxed at all, there being no provision for making such references a rule of court, and the word "*may*" therefore was used as giving what was considered to be the only jurisdiction available in case a taxation should be necessary.

*Bhear v. Harradine*, 7 Ex. 269; Ch. Arch. Prac. 11th Ed. 127; *Re Lemon and Peterson*, 8 U. C. L. J. 185; *Ex parte Glass*, 3 P. R. 138; *Marshall on Costs*, 212; *Sparrow v. Johns*, 6 Dowl. 554; *Smith v. Taylor*, 7 Bing. 263, were referred to on the argument. See also 10 U. C. L. J. 330, where the decision in Chambers is reported.

MORRISON, J., delivered the judgment of the court.

In this case we are of opinion that the learned judge's order should be rescinded. The only point that could raise any doubt was whether, as argued by Mr. *Harrison*, the fact that there were charges in the bill arising from an application for a judge's order for a subpoena, which was issued for witnesses to attend before the arbitrators, gave jurisdiction to the Master to tax the whole bill. This application for a subpoena being a matter auxiliary to the arbitration, (if an authorized proceeding at all,—See the 13th sub-section of section 11, Consol. Stats. C., ch. 66, "*The Railway Act*,") we think ought not to have the effect of withdrawing the taxation of the bill from the officer specifically named by the Legislature.

Rule absolute.

## JAMES V. MCGIBNEY.

*Mortgage—Proviso for possession by mortgagor until default—Estoppel.*

Defendant, being lessee for years, with a right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee for £118, payable in six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff; and to an action of ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default.

*Held*, that the plaintiff was not estopped, for, 1. The second mortgage might take effect by passing an interest; 2. If the plaintiff was estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large; but, 3, *Seemle*, that the re-demise in a mortgage cannot operate by estoppel or otherwise to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass.

*Quære, per Hagarty, J.*, whether, although the proviso could form no defence to this action, the defendant might not have a remedy elsewhere to prevent such a violation of the plaintiff's personal contract not to disturb his possession.

EJECTMENT for lot No. 12 on Rideau Street, in the city of Ottawa; writ issued the 2nd of March, 1864; appearance for the whole on the 17th of March, 1864. The plaintiff asserted title under a deed of assignment from Margaret Stevenson to him of a mortgage by defendant to the said Margaret Stevenson, in the condition whereof default had been made. The defendant claimed under an agreement made between himself and the plaintiff, contained in a mortgage deed made by defendant to plaintiff.

The case was tried at Ottawa in March, 1864, before *Adam Wilson, J.*

The plaintiff put in an indenture dated the 3rd of March, 1859, whereby the defendant conveyed to one Margaret Stevenson, her heirs, executors, administrators and assigns, for ever, all his right, title, interest, claim and demand whatsoever to the premises in question, together with the residue yet to come and unexpired of a term of years in the same premises, created by an indenture of lease from the principal officers of Her Majesty's Ordnance, the right of renewal, the right of purchase, and the freehold, should the title at any time thereafter be converted into a freehold, subject to the payment of the rents reserved, and subject to a proviso that if defendant paid to Margaret Stevenson, her heirs,

executors, administrators or assigns, £75, within four years from the date, and the interest half yearly, with all taxes, rents, &c., &c., then the indenture should be void. The defendant covenanted that the mortgagee, her heirs, &c., might enter on default. There was also a power of sale, and a declaration and agreement that until default defendant might hold and occupy the premises without interruption by the mortgagee, her heirs, &c.

The plaintiff also put in an indenture, dated the 19th of March, 1863, whereby Margaret Stevenson, (after reciting the foregoing mortgage, and that the principal and interest secured thereby were unpaid,) in consideration of £92 10s., granted and assigned to the plaintiff the same premises, and her right, title, and interest therein, with the residue of the said term, the right of renewal, the right of purchase, and all other rights granted by the said mortgage, and the freehold of the said premises, should the same be thereafter converted into freehold, subject to the defendant's right of redemption; and also the principal sum of £75, with interest from the 3rd of March, 1859, with a power of attorney to sue for the same in her name.

The execution of both these instruments was admitted, and upon them the plaintiff rested his case.

The defendant put in evidence an indenture, dated the 3rd of April, 1861, whereby he, the defendant, in consideration of £118, granted, bargained, sold, released and conveyed to the plaintiff, his heirs and assigns, the same lot of land, and all the estate, &c., at law and equity, to hold in fee, subject to a proviso for making the same void on payment of £118, with interest, within six years from date. This mortgage contained the usual covenants, and it was thereby declared and agreed that the defendant, until he made default in payment of the money and interest in the proviso mentioned, might hold, use, occupy, possess and enjoy the premises, without interruption from the plaintiff.

The learned judge ruled that the mortgage of 1861 precluded the plaintiff from disputing the defendant's right to convey at that time, and that the plaintiff could not set up the defendant's prior mortgage of 1859 against the defendant,



but that as against the plaintiff that mortgage must be presumed to be satisfied; and that under the clause entitling the defendant to possession until default, contained in the second mortgage, the plaintiff could not disturb the defendant, as under that mortgage there had been no default: that the plaintiff having made in 1861 what was in effect a lease to the defendant for six years could not, by becoming the assignee in 1863 of the mortgage of 1859, disturb the defendant in his possession conferred upon him by the mortgage of 1861.

The plaintiff was thereupon nonsuited, with leave to move to enter a verdict for him if the court should be of opinion in his favor.

In Easter Term *C. S. Patterson* obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff upon the leave reserved, or why a new trial should not be granted, on the ground that the second mortgage did not operate in law as a re-demise, but only to restrain the plaintiff from disturbing the defendant in respect of the estate by that mortgage conveyed.

In Trinity Term *Carroll* shewed cause, citing *Ford v. Jones*, 12 C. P. 358; *Konkle v. Maybee*, 23 U. C. R. 274.

*Patterson*, in reply, referred to *Doe v. Barton*, 11 A. & E. 311; *Doe v. Seaton* 2 Cr. M. & R. 730; *Right v. Bucknell*, 2 B. & Ad. 278; *Sidey v. Hardcastle*, 11 U. C. R. 162; *Copp v. Holmes*, 6 C. P. 373.

DRAPER, C. J.—There is no difficulty as to the facts which the evidence establishes. The defendant had a term of years, with a right to purchase the fee, in the premises sought to be recovered. In March, 1859, he mortgaged this estate and interest to Margaret Stevenson, to secure £75, payable in four years, with interest half-yearly, and the mortgage contained a re-demise to him until default. In April, 1861, he made another mortgage of the same premises in fee to the plaintiff, to secure £118, payable, with

interest, at the end of six years, with a re-demise from the plaintiff to him until default. Nothing is shewn to have been paid on the first mortgage, and nothing is yet due upon the second. In March, 1863, and after the principal money secured by the first mortgage was due, the plaintiff, for a valuable consideration, procured an absolute assignment thereof, and it is under this mortgage and assignment that he claims to eject the defendant. The defendant sets up the re-demise in the second mortgage as a bar to the plaintiff's recovery.

The defendant relies wholly on the estoppel which he insists is created by the plaintiff executing the second mortgage. He contends that the plaintiff cannot deny that the defendant was seised in fee simple, and conveyed such an estate by way of mortgage to the plaintiff; and that he cannot therefore set up a title to the possession demised under the first mortgage. The nonsuit was granted, as I understand, on this ground. There is no recital in either of the mortgages.

I have not been able to bring myself to a conclusion that the nonsuit can be upheld.

A deed which can take effect by passing an interest, however small, shall not take effect by estoppel. This doctrine is to be found in Treport's case, (6 Co. 15,) and is confirmed by Brudnell v. Roberts, (2 Wils. 143,) and Blake v. Foster, (8 T. R. 487.) In the note in 2 Wms. Saund. 418 b., referring to the last two cases, it is said, "If the grantor grant a larger interest than he is entitled to, still, as *some* interest passes by the conveyance, though it be for a shorter period than *he* intended and the conveyance professes to grant, it is sufficient, and will prevent an estoppel for a longer period than the *legal duration* of the estate so granted." In fact Doe v. Barton (11 A. & 307,) goes so far as to shew that a mortgagor in possession, who is not treated by the mortgagee as a trespasser, may confer on his lessee the legal possession, although the mortgage was in fee. In the present case the evidence shewed by irresistible inference that the defendant, after having, on the 3rd of March, 1859, mortgaged his legal

estate and interest, retained possession, and that he was not treated as a trespasser by the mortgagee: that he held under a re-demise to him for four years, though defeasible. Therefore the mortgage of the 3rd of April, 1861, did, as it appears to me, take effect by passing a legal interest, and although but a scintilla, sufficient to prevent that deed from taking effect by estoppel.

Then there is another ground on which the same conclusion may be supported. It is an established rule that an estoppel against an estoppel sets the matter at large. Now, the defendant was estopped by the first mortgage from denying that the right and interest he then had in the premises was that of a tenant for a term with a right of purchase. This interest the plaintiff acquired in March, 1863, and as privy in estate had the same right to set up this estoppel against the defendant as the latter had to avail himself of an estoppel against the plaintiff under the second mortgage.

Conceding, therefore, that this estoppel contended for on the part of the defendant exists, it appears to me to be answered, and I think therefore the rule should be made absolute to enter a verdict for the plaintiff.

The mutual obligations and restrictions imposed by an ordinary lease as between lessor and lessee are well understood. It is equally well settled that a mortgagor cannot dispute the title of his mortgagee. The re-demise commonly inserted in mortgages is not in all respects the same thing as an ordinary lease. As I understand it, all that the mortgagee professes to grant is a defeasible term carved out of the estate which, by the same instrument, the mortgagor has granted and conveyed to him. I am not prepared to decide that the re-demise operates either by estoppel or otherwise against the mortgagee to any greater extent than the title and interest which the mortgagor conveyed to him enabled him to re-demise. If the mortgagor has no such title as the mortgage professes to pass, and has, as in this case, covenanted for such title, I do not perceive that *the re-demise* can go beyond that which he has in fact granted to the mortgagee. The mortgagee could



maintain an action for the breach of covenant for title, and if so, there is certainly ground for arguing that it will not operate to the extent of an ordinary lease to estop the mortgagee from denying that it extends beyond such estate and right as the mortgagee had derived from the mortgagor himself.

HAGARTY, J.—I do not dissent from the conclusion arrived at, that the defence fails at law, and the supposed re-demise at the end of the mortgage fails with the larger estate out of which it is carved. I am not free, however, from doubt whether defendant would not have a remedy elsewhere on the facts.

I do not think there is any estoppel, properly so called, on the plaintiff. No fraud or concealment of the first mortgage is charged against defendant, and it may be that the plaintiff was perfectly aware of its existence, and took the second charge as the best security he could get. He then contracts that the mortgagor should not be disturbed so long as he observed the terms of payment of the debt and interest. This may be no defence to his ejectment, brought as assignee of the first mortgage, but as a matter of contract and agreement between the parties, I am not at all satisfied that the plaintiff could be permitted by any acquisition of earlier title, or anything done by him, to violate his own personal contract with defendant, not to disturb him while he observed the terms of the agreement on his part.

MORRISON, J., concurred.

Rule absolute.

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## SULLIVAN V. KING.

*Notice to produce—Time of service—Award, proof of—Right to recover costs directed to be paid equally.*

The declaration alleged that the plaintiff and defendant each became bound to the other, conditioned, after reciting certain differences that had arisen, to abide by the award of two persons named, and such third person as they might appoint, concerning the same, costs to be in their discretion: that an award was duly made that defendant should pay the plaintiff \$440, and each pay their own costs of the submission, and that \$60, other costs, should be paid by them equally. *Breach*, nonpayment of the \$440, and a moiety of the \$60. *Pleas*, denying the submission and award.

The plaintiff proved the execution of defendant's bond, and gave secondary evidence of having executed a similar bond himself, which was given to defendant, and of the appointment of the third arbitrator endorsed on it, having served a notice to produce on defendant's attorney, at 11 a.m., on the day previous, the commission day, defendant living seventeen miles off, at a place to which there was a daily mail. He also proved by one of the arbitrators the execution of the award by all three.

- Held*, 1. That the execution of plaintiff's bond being put in issue, it might properly be presumed to be in possession of defendant's attorney; and if it were not, that the notice under the circumstances was sufficient.
2. That the award being signed by the three arbitrators, afforded proof, *prima facie*, that they signed in each other's presence, no question having been put to the witness on that point.
3. That the plaintiff having paid the \$60, was not entitled to recover half of it from defendant.

The rule *nisi* was to enter a nonsuit on the first two points, or to reduce the verdict on the third, and as each party failed on a material part of the rule, no costs were allowed.

DECLARATION, averring that differences had arisen between plaintiff and defendant: that the plaintiff and defendant each became bound to the other in a penal sum of £200, dated the 27th of July, 1854, conditioned, after reciting the differences that had arisen, that if the plaintiff and defendant should respectively submit to, abide by, and perform the award, arbitrament and determination of Hamilton Bligh O'Connor and Andrew Carrick, and such third person as they might appoint, concerning the matters in dispute, provided such award should be made in writing under the hands and seals of the arbitrators, or any two of them, ready to be delivered by the 1st of September, 1864, then the bonds should be void; and it was thereby agreed, that the bonds and the award might be made a rule of either of the Superior Courts; costs to be in the discretion of the arbitrators. Averment, that the two arbitrators before proceeding appointed John Galt the third arbitrator: that before the time appointed for making the award, the three

arbitrators, having heard, &c., on the 22nd of August, 1864, made their award in writing under their hands and seals, ready to be delivered, and awarded that the defendant should pay to the plaintiff \$440, in full of all demands of the late Morgan Sullivan, and of the plaintiff representing Morgan Sullivan, and of the plaintiff, against the defendant, in the matters referred, and that the plaintiff and defendant should pay their own costs of the submission, and that \$60, the amount of other costs attending the submission and of making the award and bonds, should be paid in equal shares by the plaintiff and defendant. *Breach*, that defendant has not paid the said sum of \$440 and a moiety of the \$60.

*Pleas*, 1. That there was no such submission to arbitration.

2. That the three arbitrators did not make any such award.

The trial took place at Goderich, in September, 1864, before *Hagarty*, J.

The plaintiff put in and proved by a subscribing witness the bond made by the defendant. The same witness also proved that he was a subscribing witness to the execution by the plaintiff of a precisely similar bond, and that he drew them both. Before this last evidence was given, the plaintiff proved that at 11 a.m., on the preceding (the commission) day, a notice was served on the defendant's attorney at the county town, Goderich, to produce the bond given by the plaintiff to the defendant, and referred to in the declaration, and also the appointment of the third arbitrator indorsed upon the bond. After this the learned judge admitted secondary evidence on both points, subject to the objection that the notice was given too late.

One of the arbitrators proved the execution of the award by all three arbitrators, and that he saw the plaintiff's bond at the arbitration, and gave it to the defendant, who lived about seventeen miles from Goderich, and that there was a daily mail between the two places. He also proved the appointment of the third arbitrator to have been made by the other two, and to have been written on the back of one of the submission bonds. It was not indorsed on the bond given by the defendant.



A verdict was rendered for the plaintiff, and damages \$473<sup>50</sup>/<sub>100</sub>, with leave reserved to move to enter a nonsuit, or to reduce the verdict by \$30, the moiety of the costs of the award.

*Robert A. Harrison* obtained a rule to shew cause why a nonsuit should not be entered on the leave reserved, objecting, 1, that there was no proof of the execution of the two bonds; nor, 2, of the appointment of the third arbitrator; nor, 3, of the execution of the award: 4. That the award, as regarded costs, was in excess of the arbitrators' powers: 5. That the secondary evidence ought not to have been received, the notice to produce not having been served in sufficient time; or to reduce the verdict on the leave reserved, the award being in excess of the arbitrators' powers, and the plaintiff not being entitled to recover in this action any costs under the award.

*S. Richards*, Q. C., shewed cause, citing *Tay. Ev.* 427; *James v. Mills*, 4 U. C. R. 366 *Sturm v. Jeffree*, 2 C. & K. 442; *Hicks v. Richardson*, 1 B. & P. 93; *Lloyd v. Mostyn*, 10 M. & W. 478.

*Harrison*, in support of the rule, cited *Stalworth v. Inns*, 13 M. & W. 466; *Wright v. Graham*, 3 Ex. 131; *Brazier v. Jones*, 2 M. & R. 88; *Wade v. Dowling*, 4 E. & B. 44; *The Corporation of Toronto and Leak*, 23 U. C. R. 223; *Eads v. Williams*, 24 L. J. Chy. 531; *Coombs v. The Bristol and Exeter R. W. Co.*, 1 F. & F. 206.

DRAPER, C. J., delivered the judgment of the court.

It is expressly put in issue by the pleadings whether the defendant as well as the plaintiff joined in the submission, and hence it may be properly presumed that the plaintiff's bond would be in the possession of the defendant's attorney. Even if it were not, there was reasonable time to procure it under the circumstances. Although the decision of a judge at *Nisi Prius* in a matter of this description is open to correction, yet we ought to see very clearly that he has decided erroneously before we interfere. For all that is

shewn the defendant's attorney had the bond in court. I certainly should have admitted the evidence under the circumstances.

The objection that the three arbitrators must sign in each other's presence was not taken at the trial, nor is it stated in the rule *nisi*. If taken, we think it should be shewn affirmatively that the arbitrators did not execute in each other's presence, as the award being proved to have been signed by the three affords, in our opinion, *primâ facie* evidence that it was properly signed. No question on this point was put to the witness who proved the three signatures, and he was one of the arbitrators. The case of *In re Lord and Lord*, (1 Jur. N. S. 893,) and the cases cited by Mr. *Harrison*, sustain the contention on his part, if the point were open.

The award certainly does not make it the duty of the defendant to pay to the plaintiff the moiety of the \$60. The payment by the plaintiff was for his own advantage, and as appears to me voluntary, though according to *Hicks v. Richardson*, cited by Mr. *Richards*, it might be enforced by attachment, at least on the application of the arbitrators. *Bates v. Townley* (2 Ex. 152) is against the plaintiff. But this can have no other effect than to reduce the verdict.

We think the rule should be made absolute to reduce the verdict by \$30, and be discharged as to the residue; and as each party fails on one material part of the rule, that neither should have costs thereon.

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## SNARR V. WADDELL, SHERIFF.

*Execution—Priority—Sale after appointment of new sheriff—Action for false return—Fraud in not defending action.*

Action against the sheriff for false return to a *fi. fa.*, the question being whether the writs standing before the plaintiff's were in defendant's hands to be executed, and whether one of them was not fraudulent. The plaintiff's writ was delivered to defendant on the 19th of May, 1864. The previous sheriff had been superseded on the 9th of March, and defendant appointed on the 11th. There had been two previous writs, at the suits of B. and J., respectively, in the hands of the late sheriff, and received by defendant before the plaintiff's writ. The bailiff who held a warrant from the late sheriff to execute B.'s writ, sold some of the goods to B. at a valuation, on the 8th of April, for about the amount of his execution, without any auction, or any notice, or bill of sale, and B., being advised that this sale was ineffectual, purchased the same and other goods at the sale made by defendant on the 17th of June, under his own and J.'s writ, which absorbed all the proceeds. The deputy of the late sheriff swore that this bailiff's warrant had been countermanded on the 12th of March, and it did not appear that the execution of the writ had been commenced before defendant's appointment.

*Held*, that the plaintiff could not recover, for the sale by the bailiff of the late sheriff to B. was, under the circumstances, a nullity, and the writs of B. and J. were in defendant's hands to be executed before that of the plaintiff.

It appeared that B.'s judgment was made up for the most part of notes on which he was liable for the defendant in the execution, but which he had not then paid. The defendant had not defended B.'s action, though he had for a time defended that of the plaintiff. *Held*, that this conduct did not of itself avoid the judgment, and that the jury were warranted in finding it not fraudulent.

The declaration stated that the plaintiff, on the 18th of May, 1864, recovered a judgment against Reid and Ruttan for \$182 74, and sued out a *fi. fa.*, directed to the sheriff of Northumberland and Durham, to levy the amount of the judgment, interest, and costs: that the writ was delivered to the defendant, and at the time of the delivery of the writ, and for a reasonable time afterwards, there were goods of the said Reid and Ruttan, of which defendant had notice, and could have levied thereout the said monies. *Breach*, that defendant did not levy, &c., but made default in the execution, whereby plaintiff was delayed, &c.

*Second count*, stating the delivery of the *fi. fa.* to the sheriff, set out that the defendant levied the money, but falsely returned that he had taken goods to the value of 1s., which remained in his hands for want of buyers, and that Reid and Ruttan had no more goods—whereby, &c.

*Third count*, for money had and received by defendant, as sheriff, for the plaintiff's use, and for interest.



*Pleas.*—To the first, count, 1, not guilty. 2. Denial of the suing out the *fi. fa.*, as alleged. 3. Denial of the delivery of the writ to the sheriff. 4. That there were not, at or after the delivery of the writ, any goods of Reid and Ruttan, whereof defendant could levy, &c.

Similar pleas to the second count.

To the third count, never indebted.

The case was tried in October, 1864, at Cobourg, before *Morrison, J.*

The plaintiff put in an exemplification of a *fi. fa.*, issued from the county court of the United Counties of York and Peel, tested the 18th of May, 1864, corresponding with the writ stated in the declaration, and proved that Reid, one of the defendants, lived in Cobourg, and had in May, and after, goods in his possession exceeding \$400 in value. The writ appeared to have been received by the defendant on the 19th of May.

It was proved that by an instrument under the great seal, dated the 9th of March, 1864, the late sheriff of Northumberland and Durham was superseded, and that the defendant was appointed to succeed him by a commission dated the 10th, and recorded the 11th of the same month. On the 20th of May the late sheriff died.

There had been several writs against the goods of Reid and Ruttan, or of Reid alone, before the plaintiff's, of which the following require to be noticed: 1. One in favor of Waddell against both, tested the 9th of March, 1864, received by the late sheriff on the same day, and received by the defendant on the 1st of June following. 2. Another in favor of Johnson against Reid alone, tested on the 1st of December, 1863, received by the late sheriff on the 16th of March, and by defendant on the 11th of April following. 3. Another in favor of Burnham against Reid alone, tested the 11th of March, 1864, received by the late sheriff on the same day, and by the defendant on the 11th of April following. This was for a large sum, about \$1,850. The other two together a little exceeded \$400. The plaintiff's writ was delivered to the defendant on the 19th of May, 1864.

By indenture dated 9th of May, 1864, the late sheriff assigned to the defendant the various writs, &c., mentioned in a schedule thereto annexed.

Arthur Hawes swore that he was in the employment of the defendant as sheriff, and had been deputy and clerk to the late sheriff. He had the writs in favor of Johnson, Waddell, and Burnham, in his hands. No seizure was made by the late sheriff on Waddell's or Johnson's writs, but warrants to execute them were delivered by him to a bailiff.

Waddell's and Burnham's writs were inserted in the schedule, but the entry was struck through with a pen; no explanation was noted. Hawes stated that neither of them had been transferred by the late sheriff to the defendant. Johnson's writ was inserted in the schedule, and was also struck through, and opposite to the entry was written by Hawes, "Deft. Reid holds sheriff's receipt." The reason given to the defendant why Waddell's and Burnham's writs were struck out was that Reid said he would pay them. Hawes held these writs, as he considered, to be executed; and the attorney for Johnson and Burnham, on the 11th of April, 1864, took them out of Hawes' hands, and delivered them to the defendant.

On the 3rd of June, 1864, a seizure of Reid's goods was made on Waddell's, Burnham's, and Johnson's writs. The sale was on the 17th of June, and realized \$1,827 20. Waddell's and Johnson's writs were satisfied. The remainder was appropriated to Burnham's writ. The furniture in Reid's house and the goods in a drug store were seized. All these had previously belonged to one Musson, against whom Reid had recovered a judgment, on which a *fi. fa.* had been issued, and the goods were thereupon sold to Reid at a valuation of sixty-four cents in the dollar. Shortly after this the bailiff who had the warrant from the late sheriff to execute Burnham's *fi. fa.* against Reid, with the late sheriff's authority, sold the goods and furniture to Burnham at a valuation of fifty cents on the dollar, taking Burnham's receipt for the amount, \$937.84, as money paid to him on his execution. Burnham took the goods at this valuation,

as they stood on the 3rd of June, and he was put into possession, though there had been no auction, and no bill of sale was executed, and some of the goods were sold at the store up to the 10th of June. Burnham was advised that this sale could not be upheld, and he purchased again at the sale made by defendant on the 17th of June, 1864. No money came into defendant's hands on any of these writs. Burnham received every thing, and produced to defendant receipts shewing that Waddell and Johnson were satisfied.

As to the receipt given by the late sheriff on Johnson's writ, Hawes swore that he knew no money had been paid, and told Reid so: that on the 12th of March, 1864, he had countermanded all the warrants which, as deputy-sheriff, he had given to the bailiff to execute these writs, and that the late sheriff on account of his illness did not attend to his duties. He also said that the defendant was unwilling to receive Johnson's or Burnham's writs, but that their attorney insisted on it. Neither of these writs were entered in the defendant's *fi. fa.* docket, but there were entries shewing the execution of them in his sale book. He also explained that the return of goods to the value of 1s. on the plaintiff's writ related to Ruttan's goods, but that Reid's goods having been exhausted, he thought nothing could be made on a *ven. ex.* About two days before the sale the defendant was notified that the plaintiff claimed priority over Burnham's writ, on the ground that it was fraudulent: that it was not for a *bonâ fide* debt.

In reply, Burnham was examined for the plaintiff, as well as Reid and Ruttan, with a view to impeach the judgment recovered by Burnham against Reid. Burnham stated that his whole account against Reid before suit was \$1,814.75, of which \$1,100 consisted of notes on which Burnham was liable for Reid, and which were not paid when the account was made up on the 20th of February, 1864, though at the time of the trial he had paid them up to within \$300. He knew that Reid was not very well off, and he wanted security. Reid was willing to secure him. Nothing was said between them about Reid not defending Burnham's suit against him, and Burnham swore he did not know Reid was becoming



insolvent. Before he made out his account against Reid he had been sued jointly with Reid\* by Waddell. Reid stated that he now knew he was unable to pay his debts on the 20th of February last, but at that date he did not know it: that Burnham told him he wished to get judgment against him, and after seeing the account he consented to his doing so: that all the notes in that account were *bonâ fide* transactions: that he instructed Mr. Ruttan to defend the plaintiff's suit for time, and he thought that Burnham's suit had been commenced. Ruttan stated that Reid instructed him to keep off the plaintiff's suit for three weeks, and if not paid then to allow judgment; and as it was not paid Ruttan withdrew the plea, and allowed judgment to go by default.

The learned judge told the jury to assume that the writs of Burnham and the others had priority over the plaintiff's, and left them to find whether Burnham's judgment was fraudulent or not, and whether the defendant sold the goods at fair prices.

The plaintiff's counsel objected that the plaintiff's writ was entitled in priority in law and in fact: that it should have been left to the jury to say whether the other writs were in the defendant's hands for execution at the time the plaintiff's writ was received; and that Burnham's judgment, being recovered for an amount not then due, was fraudulent.

The jury found for the defendant.

*Hector Cameron* obtained a rule to shew cause why there should not be a new trial on the following grounds:—1. For misdirection in ruling that the executions of Johnson, Waddell, and Burnham, were entitled to priority, and were legally in the Sheriff's hands for execution on the delivery of the plaintiff's writ to him, and were not abandoned or satisfied. 2. That the verdict was against evidence, or the weight of evidence, as to Burnham's judgment being fraudulent, and being satisfied as to \$937.84, and not being entitled to priority over that of the plaintiff. 3. That the verdict was against evidence, and the weight of evidence, as to the three executions being delivered to the defendant and *bond*

*fide* in his hands for execution before the plaintiff's writ was delivered to him. He cited *Lovick v. Crowther*, 8 B. & C. 132; *Withers v. Parker*, 5 H. & N. 725; *McKee v. Woodruff*, 13 C. P. 583; *Gates v. Smith*, *Ib.* 572; *Burge on Suretyship* 358, 378; *Watson on Sheriff*, 24; *Sewell on Sheriff*, 20, 27.

*C. S. Patterson* shewed cause, citing *Impey on sheriff*, 90.

DRAPER, C. J. delivered the judgment of the court.

This case gives rise to two questions. 1. Whether on the facts proved the writs of Waddell, Johnson and Burnham, were in the defendant's hands as sheriff to be executed before the plaintiff's writ. 2. Whether the judgment and execution of Burnham were fraudulent and void as against the plaintiff.

The evidence does not distinctly shew on what day the defendant entered upon the duties of his office. He might have legally done so on the 11th of March, 1864, and *a fortiori* on the 12th, and it is made probable that he did so by the fact that Hawes, who was deputy to the preceding sheriff, revoked on that day warrants which he had given to a bailiff to execute Burnham's and Johnson's writs, and perhaps Waddell's also, on none of which writs had any proceeding been taken or execution commenced up to that time.

These three writs were entered in the schedule of those assigned by the late sheriff to the defendant, but the entries were struck through with a pen. The reason for striking out Johnson's was that Reid held the late sheriff's receipt for it, though it was distinctly sworn that Reid had paid nothing on it. As to Burnham's, the plaintiff's contention is that it was executed by the sale made to him by the bailiff of the late sheriff, and, as the bailiff swore, with the authority of the late sheriff. It appears to us impossible to uphold this as a sale for any purpose. According to Burnham's receipt this transaction took place on the 8th of April, nearly a month after the revocation of the warrant given to the bailiff. It is true he says he had the late sheriff's authority, and he had refused to give up the warrant to Hawes when required

to do so on the 12th of March, and notwithstanding that Hawes was the deputy-sheriff conducting the business, as his principal was unable to attend to it from illness. There is no proof that execution of this or any other writ against Reid's goods was commenced before the defendant's appointment, or that a seizure was made, or that any notice of sale was given. There was no auction and no bill of sale.

The only thing to give rise to a doubt is that Burnham was a party to the transaction, but we think that is insufficient to charge the defendant, unless it operates as a satisfaction of Burnham's writ, so that it had no force on the 11th of April, when it was delivered to the defendant to be executed. But Burnham's receipt was for little more than half the amount of his execution, which therefore was an unsatisfied writ *pro tanto*. The defendant acted upon it with others, of which Johnson's, at all events, was in the defendant's hands for execution before the plaintiff's, and he seized and sold the very property which the bailiff had professed to sell to Burnham, who certainly acquiesced in the latter sale, purchasing at it, and giving credit on his execution for money received by him on the sale of some of the drugs while in his possession. It does not appear that Reid was dispossessed of the furniture before the sale by the defendant.

In our opinion the sale by the bailiff was a nullity. It was wholly abandoned by Burnham, and could not that we see operate to satisfy his writ; and still less could it be an estoppel to prevent the defendant from shewing the truth. It appears to us therefore that these writs of Johnson and Burnham were in the defendant's hands to be executed before that of the plaintiff. As to Waddell's writ, it becomes unimportant for the purposes of this action, for if no notice be taken of it the other two will absorb all the proceeds of the sale.

As to the second point, *Imray v. Magnay* (11 M. & W. 267,) decides that fraud in a previous judgment and execution may be set up in an action for a false return, in answer to a defence grounded upon such previous execution, where the sheriff is the defendant. This case was followed in *Christo-*



pherson v. Burton, (3 Ex. 160,) though it seems to be doubted and reasons against it are suggested in Remmett v. Lawrence (15 Q. B. 1004.) The jury have, however, determined the question of fraud against the plaintiff, and we think there was sufficient evidence to sustain their finding. But Mr. Cameron urged that they ought to have been directed that the fact that Reid did not defend Burnham's action and did for a time defend the plaintiff's, established that Reid gave Burnham a fraudulent preference, and therefore that the judgment of the latter was void. Young v. Christie (7 Chy. Rep. U. C. 312,) was referred to, but that case is adverse to Mr. Cameron's argument, as it decides that a debtor's defending an action brought against him by one creditor, and allowing another creditor to obtain judgment against him by default, is not such a fraudulent preference as to render a judgment void.

On the whole, we think this rule should be discharged.

Rule discharged.

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### YOUNG V. O'REILLY.

*C. S. C. ch. 79, sec. 4—C. S. U. C. ch. 32, sec. 15—Construction of.*

*Quære*, whether sec. 4 of Consol. Stats. C. ch. 79, authorizing the issue of a subpoena to Lower Canada, applies to a party to the suit. *Semble*, not, as Consol. Stat. U. C. ch. 32, sec. 16, apparently contemplates a commission in such case.

A notice to attend, under sec. 15 of the last-mentioned act, served on the 25th of October for the 1st of November, is too late, not being "at least eight days."

This was an action on a bond, to which defendant pleaded payment.

The case came on at Picton, on the first day of the assizes, before *Morrison*, J., the plaintiff's counsel stating that he was not aware of any defence, and the plaintiff had a verdict for £677 5s.

Sir *H. Smith*, Q. C., obtained a rule *nisi* for a new trial on affidavits, to which *Hector Cameron* shewed cause.

The defendant, in his affidavit filed on moving the rule, stated that notice for the examination of the plaintiff by the defendant on the trial was served on the plaintiff's attorney on the 25th of October, for the plaintiff to appear at the assizes on the 1st of November, and \$13 conduct money then paid, the plaintiff's residence being at Quebec; and two or three days afterwards he was informed that the plaintiff was at Trenton, and was in Upper Canada at the time of the trial, and the \$13 had never been returned: that a *subpœna duces tecum* was also served at the plaintiff's place of business in Quebec on the 29th of October, 1864, and \$15 conduct money paid.

The case is not material to be reported except as regards the effect of this notice and subpœna, and the facts, therefore, appearing in the affidavits are not further stated.

DRAPER, C. J.—Notice of trial was given for the last spring assizes, and the case was postponed at the defendant's request, as is shewn by a writing signed by himself, in which he says he is not prepared with evidence. It was therefore incumbent on him to be ready at the last assizes. It is not shewn that he did anything until the 25th of October, and then he served the plaintiff's attorney (the plaintiff residing and carrying on business in Quebec) with a notice that the plaintiff would be examined at the trial on the defence. But this notice was a day too late. Sec. 15 of ch. 32, Consol. Stat. U. C., requires "*at least eight days notice,*" conceding for this purpose that a plaintiff residing out of Upper Canada can be thus required to attend.(a)

On the 29th of October a *subpœna duces tecum* was served at the plaintiff's office at Quebec, on one of his clerks, for the plaintiff to appear at Picton on the 1st of November. I doubt whether the plaintiff would have been bound to obey the writ, for I doubt if a party to a cause would come within the meaning of the Consol. Stats. C., ch. 79, sec. 4, as the 16th section of the Consol. Stat. U. C., above quoted, apparently contemplates the issue of a commission in such a case, in lieu of the notice or subpœna

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(a) In *Tyre v. Wilkes*, 18 U. C. R. 46, it is held that he cannot.

provided for in the 15th section. But at all events the subpoena was nugatory, for from the statement in the defendant's affidavit that the plaintiff was then in Upper Canada, he would have had no notice, in all probability, of its service in Quebec.

The learned Chief Justice here stated the other facts set out in the affidavits, which it is unnecessary to report, the decision being not to grant a new trial except upon payment of costs, and bringing the amount of the verdict into court within six weeks.

### SKEAHON, EXECUTRIX OF RICHARD SKEAHON, v. WHELAN.

#### *Ejectment—Notice of title.*

The plaintiff, in ejectment, describing herself as executrix of R. S., claimed title by virtue of "a mortgage made by the defendant." *Held*, that she was not restricted to proof of a mortgage made to herself, but might shew one to testator, and her own right as devisee; and that omitting to name the mortgagee was at most only want of "reasonable certainty," for which defendant might have applied under sec. 13, of the Ejectment Act, C. S. U. C., ch 27.

The addition of "executrix of," &c., to the plaintiff's name, *Held*, mere matter of description.

**EJECTMENT.**—The plaintiff gave notice that she claimed title by virtue of "a mortgage made by the defendant."

The defendant gave notice that he claimed title by virtue of a deed of bargain and sale by the said Richard Skeahon to him, the defendant.

The case was tried at Ottawa in October, 1864, before *Richards, C. J.*

The plaintiff proved a mortgage of the premises, dated the 24th of March, 1863, from defendant to Richard Skeahon, and that there was a default. Richard Skeahon died about the middle of May, 1863. On the same day on which the mortgage bore date he made a will (duly executed,) and devised the premises to the plaintiff.

For defendant it was objected that the notice of title did not let in the evidence of the will, and the objection was rested on the construction placed on the notice—namely, that it meant a mortgage made by defendant to plaintiff,



and the mortgage proved was not made to her as executrix : that the addition of " executrix of," &c., is not mere matter of description.

The learned judge reserved leave to move on the objection, and the plaintiff had a verdict.

*M. C. Cameron*, Q. C., moved accordingly, objecting also that under this notice the plaintiff could not prove title as the devisee of the mortgage, but was bound to shew a mortgage to herself.

DRAPER, C. J., delivered the judgment of the court.

We think the words of the plaintiff's claim of title do not restrict her to proof of a mortgage made to herself. The defendant is notified that she claims title by virtue of a mortgage executed by himself, and he must know what mortgage was alluded to, and that it was in fact a mortgage made by him to the husband of the plaintiff, and consequently that her title was derivative. It was open to him, if he thought there was a want of reasonable certainty in this, to have applied under the 13th section of the Ejectment Act. When he claims his title as a purchaser from the deceased husband, it leaves no doubt that he well understood what the claim to eject him was founded on.

At the same time the plaintiff has displayed some ingenuity in embarrassing her own right to recover. First, by unnecessarily describing herself as executrix, for we consider it merely description ; and, secondly, by not going on and claiming as devisee of the mortgagee.

We think, however, that the object of the notice of title was answered when the plaintiff bound herself to shew a title under a mortgage made by defendant himself. If he desired to know *to whom*, it could only be on the ground of want of reasonable certainty in the notice. We think there should be no rule.

Rule refused.

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McKINSTRY v. FURBY.

*Appeal from County Court.*

The court refused to interfere upon appeal from a County Court, where a new trial had been refused in a case depending solely upon evidence, and involving a question of fraud.

APPEAL from the County Court of Northumberland and Durham.

This was an interpleader issue, to try the right to certain goods—a quantity of wheat, barley, hay and straw, and a horse—seized under a *fi. fa.* at the suit of the defendant against James Leach and James Leach the younger, and claimed by the plaintiff under a lease executed to him by the latter.

The jury were told that the case depended altogether on the credit they gave to the statement made by the witness James Leach: that if it was substantially true their verdict should be for the plaintiff; but if from the facts stated, or the manner in which the statement was made, they were satisfied that the lease was a mere sham to protect the property, as urged by the defendant, then their verdict should be for the defendant.

They found in favor of the plaintiff for the horse, and for the defendant as to the other articles.

A rule *nisi* obtained by the plaintiff for a new trial upon the evidence, and upon affidavits, was, after argument, discharged, the learned judge holding that the case was one peculiarly for a jury, and not being satisfied that their verdict was clearly wrong. The plaintiff thereupon appealed.

The facts are not further stated, as the case is reported only to shew the principles upon which this court act in the exercise of their appellate jurisdiction.

*Stephen Richards*, Q. C., for the appellant.

*J. D. Armour*, contra, cited *Scott v. Scott*, 9 L. T. N. S. 454; *Manning v. Ashall*, 23 U. C. R. 302; *Regina v. Chubbs*, 14 C. P. 32; *Fawcett v. Mothersell*, *Ib.* 104.

HAGARTY, J., delivered the judgment of the court.

We have perused all the evidence given at the trial, and are of opinion that no sufficient grounds appear for our

reversing the decision of the court below in favour of upholding the verdict. It is one of those cases peculiarly within the province of the jury. The plaintiff's success depended wholly on their acceptance of the testimony of his witnesses in its integrity. They saw the demeanour of the witnesses produced, and they had the advantage of noticing numerous matters apparent on a *vivâ voce* examination, necessarily unseen by us who have to depend on the written evidence.

The written testimony of the chief witness for the plaintiff may read most plausibly; it may have been elicited from him in the box in such a way as to make observant jurors distrust his truthfulness. We all know how the smooth story spread forth on affidavit is resolved into loose and untrustworthy fragments on the test of cross-examination.

We think it would be a most unwise exercise of the appellate authority of this court, if we were to interfere with the judgment of the court below; and that this appeal should be dismissed with costs.

Appeal dismissed.

### LITTLE V. FOLEY.

*Written agreement—Parol evidence—Custom in marking timber.*

By an agreement under seal between the plaintiff and B., B., in consideration of seven cents per foot, agreed to deliver to the plaintiff at Goderich harbor 14,000 cubic feet of good elm timber, to be of specified dimensions, and nothing but good sound rock elm; the plaintiff to draw it from the bush, and leave it on the bank of the river Maitland, and to pay at certain periods named. In trover for such timber, which the defendant claimed under a purchase from B., *Held*, that the agreement clearly did not prevent the plaintiff from shewing that the timber to be delivered belonged to him, and not to B.

The fact that the timber was marked with B.'s mark was relied upon by the defendant to shew that it was not the plaintiff's. *Held*, that the plaintiff might shew, in answer, that it was not uncommon for persons in charge of but not owning timber thus to mark it.

TROVER for 180 pieces of rock elm timber. *Pleas*.—Not guilty, and that the goods were not the plaintiff's.

The trial took place at Goderich, before *Hagarty, J.*

The defendant claimed under a purchase of the timber from Messrs. John Beaven and William S. Beaven, between whom and the plaintiff the following agreement was proved.



"Agreement made the 7th day of October, 1863, between Robert Little, of Wingham, Township of Turnberry, and County of Huron, Merchant, and John Beaven and William S. Beaven, of the Township and County aforesaid, Yeomen, of the other part, as follows:

"The said John Beaven and W. S. Beaven shall, in consideration of the sum of seven cents per cubic foot measure, deliver to R. Little, in Goderich harbor, not less than 14,000 cubic feet of good elm timber, the timber to be not less than one foot square, and to average 60 feet; timber to be nothing but good sound Rock Elm.

"The said R. Little shall draw all timber from the bush, also rafting material, and leave the same on the bank of the river Maitland. The said Robert Little agrees to pay the said John Beaven and W. S. Beaven the sum of \$100, in times and manner following, that is to say, \$50 on the 24th of December, 1863, and the balance on the 1st of April, 1864. The said R. Little agrees to fulfil all orders presented to him by the said J. and W. S. Beaven, or any of their employees, to the amount of \$200, if required.

"The said R. Little agrees to pay all dues and demands against the timber on its arrival at Goderich wharf.

"Witness our hands and seals } ROBERT LITTLE. [LS]  
this the Seventh day of October, } JOHN & WM. BEAVEN. [LS]  
1863.

"Witness, JOHN W. BOWMAN."

The plaintiff alleged that the timber thus to be delivered was his property from the beginning, having been purchased by him in the tree upon different lots in the neighborhood, while the defendant, on the other hand, asserted that it belonged to the Beavens, and that this being plain upon the face of the agreement, no evidence could be received to the contrary. The learned judge, however, admitted evidence as to the ownership, which was very long and contradictory, and left that question to the jury, who found for the plaintiff.

The timber had been marked by the Beavens with their mark, and it was urged for the defendant that this being done by them with the plaintiff's knowledge shewed that the timber was theirs, and that he allowed them so to treat it. The plaintiff, in answer to this, called a witness, who swore that he had been for many years engaged in lumbering on the River Ottawa, and that timber was commonly branded

with the mark of those engaged in getting it out, so as to distinguish it from other lots in the river, although they might, in reality, be acting only as agents for the real owner. It was objected that evidence of a custom upon the river Ottawa could have no bearing upon this case, and was therefore inadmissible.

*Robert A. Harrison* moved for a new trial on the evidence, for the improper reception of evidence, and for excessive damages.

DRAPER, C. J., delivered the judgment of the court.

As to the interpretation of the contract, we have no doubt that it was competent for the plaintiff to prove the facts under which the agreement was made, and that the legal construction of the word "deliver" would be properly arrived at on a consideration of those facts; and that when it appears that the plaintiff owned the timber which the Beavens contracted to deliver, we should be making the law an instrument of gross injustice, if we held that the agreement was one for the sale of the Beavens' own timber to the plaintiff, and that he was prevented by the fact that the agreement was in writing from shewing the truth.

On referring to the notes of evidence, we think the objection taken to the improper admission of evidence of a *custom* as to marking timber is not sustained. The fact that the timber was marked with the Beavens' mark was relied upon by the defendant as material to shew that the timber was not the plaintiff's, and the plaintiff gave evidence to shew that it was not an uncommon thing to mark timber with a different mark from that of the actual proprietor; but to speak of the evidence as given to establish a custom, in the technical sense of that word, is going beyond what the actual facts as appearing to us will warrant.

Upon the other grounds the court refused to interfere.

Rule refused.

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GAYNOR ET AL. V. SALT.

*Interpleader—Second application by sheriff on renewed claim by same person—Restraining action against claimant or his attorney—Practice in sending papers filed to nisi prius.*

Papers filed in court should not be sent away to be used as evidence at *Nisi Prius*, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission; and in that case the officer sending should take a voucher from the officer receiving them.

Certain goods were seized in December, 1862, under an execution against S.—W. S., his son, claimed them as the partnership goods of S. and Son. The sheriff then seized the partnership interest of S. under the same writ. An interpleader summons obtained by W. S. was discharged on the 13th of January, 1863, and he was debarred from any action against the sheriff for the seizure. He then claimed the goods as his sole property, and another interpleader summons having been obtained, an order was made upon it on the 30th of January, 1863, directing the sheriff to withdraw on certain conditions being fulfilled, in default of which he should sell, and no action be brought against him for such sale or the seizure; and (after certain directions as to security for costs) that the defendant should be barred from any action against the plaintiffs' attorneys or the plaintiffs for the seizure, or for any sale to be made under such order. The son applied for further time to comply with the terms of this order, and having failed in such compliance, the sheriff sold.

The papers filed on these applications were handed by the clerk in Chambers to the clerk of assize at the spring assizes in Toronto for 1863, to be used at the trial of a cause in which the son was plaintiff, and were mislaid.

On the 7th of March, 1863, before the time for compliance with the second order had expired, a rule was obtained to set aside the two interpleader orders; but it was enlarged, owing to the loss of the papers, until Michaelmas Term following, and then allowed to lapse, the court refusing to allow it to be supported on verified copies.

On the 16th of January, 1864, the papers were found, and W. S. obtained a rule *nisi* to rescind the two interpleader orders, or to revive the previous rule of the 7th of March, 1863. The interpleader issue directed had never been proceeded with by him.

The court refused to interfere, holding, 1. That the sheriff was entitled to interplead the second time, the claimant having alleged a different title from that on which the first summons was obtained—claiming first as partner, and next as sole owner.

2. That the second order, restraining an action against the execution creditors and their attorneys, was authorized and proper; and the loss of the papers, therefore, in consequence of which the first application against it lapsed, formed no ground for interference.

On Friday, 12th of February, 1864, the last day but one of Hilary Term, *R. P. Crooks* applied for a rule calling on the plaintiffs in this cause and their attorneys, and the sheriff of York and Peel, to shew cause why the interpleader order



made in this cause in Chambers on the 30th of January, 1863, should not be rescinded, on seven grounds or objections; and why another interpleader order made in this cause on the 13th of January, 1863, should not be rescinded upon five grounds; or why a rule granted on the 7th of March, 1863, to rescind those two orders, should not be revived, and the claimants have leave to call upon the plaintiffs and their attorneys, and the said sheriff to answer the same, on the ground that the affidavits and papers on which the said rule was obtained having been missed from the files of this court until the 16th of January, 1864, were then found; or why the court should not make such order in the premises as in justice and equity might seem proper, upon the facts as disclosed in affidavits and papers filed.

Upon moving, the following affidavits were produced, several of which had been filed on previous applications in this cause:—

1. Affidavit of Henry Skynner, Deputy-Sheriff, setting forth the seizure of the goods on an execution in this cause: that about the 27th of December, 1862, he was served with a written notice that he had seized the partnership goods of John Salt and Son, and that William Henry Salt claimed to be entitled to them as principal partner in said business, and that the said W. H. Salt was the owner of the said goods. This was signed T. H. Bull, attorney for W. H. Salt.

2. Affidavit of George D. James: that on the 29th of December, 1862, he received a telegram (annexed to the affidavit) from W. H. Salt, to represent him until further advice in the business in Toronto: that he believed W. H. Salt had at the time of the levy and still has a valid and legal title to the goods seized, or to a great portion thereof: that he expected a power of attorney from W. H. Salt on the next day.

3. Affidavit of James Constantine: (sworn 23rd January, 1863,) that he was the general agent of one Lomer, a furrier, of Montreal: that Lomer had done business with the firm of John Salt and Son, and solely trusted W. H. Salt, and that the goods furnished by him to John Salt and

Son were on W. H. Salt's individual credit; and that \$300 were due from W. H. Salt to Lomer for goods so supplied.

4. Affidavit of John Martin (sworn 23rd January, 1863:) that during the time W. H. Salt carried on business in Toronto as a hatter and furrier he had business with W. H. Salt; and after the formation of the partnership of John Salt, the same credit continued to W. H. Salt, although the account was kept in the name of John Salt and Son: that he would on no account have trusted John Salt: that W. H. Salt owed the deponent \$800 for goods sold to him entirely on his credit.

5. Affidavit of Henry Skynner, (sworn 24th January, 1863,) stating that under the same writ set out in his former affidavit he did on the 20th of December seize the partnership interest of John Salt in certain goods at the store occupied by John Salt on King Street, in the city of Toronto, as goods in which the defendant was interested as partner with W. H. Salt, and advertised the said interest for sale; and on the 26th of December he seized the said goods under the said writ as the goods in which defendant was interested as a partner with W. H. Salt, and advertised the said interest for sale. On the 26th of December he seized the goods under the writ as the sole property of the defendant, and a claim having been made on behalf of W. H. Salt, an interpleader summons was obtained. On the 13th of January, as appeared by the copy of an order annexed to this affidavit, that summons was discharged, and W. H. Salt was debarred from bringing an action against the sheriff in respect of the goods seized. Afterwards, on the 15th of January, 1863, another notice of claim to these goods was served on the deputy-sheriff on behalf of W. H. Salt, claiming them as his sole and individual property as owner, and notifying the sheriff that W. H. Salt would hold the sheriff liable for damages consequent on his remaining in possession, and preventing W. H. Salt from carrying on his business.

6. Affidavit of George James, (sworn 11th February, 1863,)—states the service on the deputy-sheriff of notice by

Bull, acting for W. H. Salt, claiming the goods seized in this cause, and the issue of the interpleader summons on the 29th of December, 1862: that the summons was enlarged to enable W. H. Salt, who was in New York, to forward an affidavit shewing his claim to the goods, sworn before the British Consul at New York, by direction of *McLean*, C. J., then presiding in Chambers: that on the return of the enlarged summons, the said affidavit of W. H. Salt was produced and filed in Chambers, and the order (stated in the preceding affidavit) discharging the summons, was made: that about the 24th of January, 1863, the sheriff obtained another interpleader summons, calling on W. H. Salt to state his claim: that this was opposed on behalf of W. H. Salt, but on the 30th of January, 1863, an interpleader order was made, ordering the sheriff to withdraw from the possession of the goods upon certain conditions: that if such conditions were not complied with, the sheriff should sell and bring the money into court; and that no action should be brought against the sheriff in respect of such sale. The usual directions for making up and trying the issue were inserted, and the sheriff was protected from an action for the seizure. It was also ordered that W. H. Salt should give the plaintiffs security for costs, or in default should be barred of his claim to the goods; and if no such security was given the sheriff should proceed to sell; also, that the plaintiffs should give security for costs to W. H. Salt, and in default that the sheriff should withdraw, and the plaintiffs should be barred of any action against the sheriff for such abandonment; and that the action brought by the said W. H. Salt against the attorneys of the plaintiffs in respect of the seizure of the goods be restrained, and W. H. Salt be barred from prosecuting the same, or from bringing any other action against the said attorneys or the plaintiffs in respect of the seizure, or of any sale to be made under this order.

7. Affidavit of Wm. A. Campbell, clerk of assize, (sworn 6th of November, 1863,) that at the spring assizes, 1863, holden at Toronto, a suit of W. H. Salt against the Consumers' Gas Company, was tried: that W. B. Heward,



clerk in Chambers, handed a quantity of papers to him for the purpose of being used on that trial: that they were used, and after the trial the deponent gave them to the counsel for the defendants in that suit, or to his clerk, and he knows nothing of them since.

8. Affidavit of Matthew R. Vankoughnet, (sworn 21st December, 1863,) that under the Interpleader Order of 30th January, 1863, the sheriff sold the goods, the said W. H. Salt having failed to comply with the conditions imposed on him as to paying into court the appraised value of the goods, or giving security for the same: that W. H. Salt did not give security for costs as required by the order, and the Master certified accordingly: that the sheriff paid \$499.46 to the plaintiffs' attorneys: that on the 7th of March, 1863, a rule as of Hilary Term was granted on the application of W. H. Salt, calling on the plaintiffs to shew cause why the orders of the 13th and 30th of January, 1863, should not be set aside: that at the suggestion of the court the money paid over by the sheriff was paid into court to abide the result of the motion: that such rule was enlarged to Easter Term, and then to Trinity Term, and then to Michaelmas Term, during which last term it was moved absolute, and an application was made to the court, on affidavit that the affidavits and papers on which the rule had been granted were missing, to be allowed to support the rule on verified copies, which application the court refused: that the rule was not enlarged in Michaelmas Term: that the money still remains in court: that there was no interpleader issue pending respecting the money and goods, none such having been instituted.

9. Affidavit of George James, (sworn 29th December, 1863,) that he was attorney for W. H. Salt, and never received any notice of appraisal of the goods seized by the sheriff having been made under the order of 30th January, 1863; states the granting of the rules mentioned in the preceding affidavit on the 7th of March, 1863, and that after the said rule was moved for, and before it was granted, he saw notices posted up in the city of Toronto for the sale of the goods seized, and he thereupon notified the deputy sheriff

that such rule was applied for and the application was pending; but that the sheriff nevertheless proceeded to sell, and as deponent was informed by one Gilmour, a sheriff's officer, realized \$1051 05, of which he paid \$499 66 to the plaintiffs' attorney, and kept the balance, as Gilmour said, for his own fees and expenses, and paid rent and taxes: that the name of W. H. Salt was over the shop door of the premises entered by the sheriff: that he believed the goods seized were when seized the property of the said W. H. Salt: that the business was ruined and destroyed by the seizure and conduct of the sheriff, as the deponent believed: that the deponent (John Salt), as he informed deponent, told the officer who made the seizure that he had no goods there, and that he told the deputy sheriff the same thing, and shewed him the articles of partnership, and told him he could only sell his (J. Salt's) interest as the articles of partnership defined it: that, as deponent believed, the sheriff professed to seize an alleged partnership interest of J. Salt, and advertised the same, and afterwards seized and sold the whole of the goods.

10. Affidavit of R. P. Crooks, (sworn 2nd January, 1864,) that in Michaelmas Term, 1863, he moved absolute the rule previously obtained in this cause, but the court refused to give judgment without the affidavits, unless the opposite parties would consent to copies being used:—states that the sheriff knew that rule was applied for, and while the application was undisposed of sold the goods and chattels, and paid \$499.46 to the attorneys for the plaintiffs in this cause: that he believes the goods sold were the property of W. H. Salt when seized—repeating what is contained in the affidavit of George James, immediately preceding, as to notice of the appraisment, ruin of the business, to the sheriff professing to seize a partnership interest, and afterwards seizing and selling the whole as the goods of J. Salt.

11. Affidavit of George James, (sworn 25th January, 1864,) after repeating the substance of his last preceding affidavit, states that the papers on which the now pending rule was granted had been missed since the spring assizes of 1863, and were found on Saturday, the 16th of January, instant:

that since Michaelmas Term (1863,) the plaintiffs' attorneys obtained a judge's order to get the \$499.46, which had been paid by them into court, paid out, and, as he was informed, they had got the money, though the order was not served on him.

12. Affidavit of Charles Victor Warmoll, (sworn 26th January, 1864,) that he did (being clerk of the plaintiffs' attorney) on the 18th of January, 1864, enclose by bank draft to the plaintiffs in this suit the balance of money due them in this suit, such money being paid out of court by Judge's order; and that the plaintiffs resided in the city of Montreal.

13. Affidavit of George James, (sworn 9th February, 1864,) that a rule to shew cause was moved for in this cause during Hilary Term, 1863, and was granted returnable the following term: that during the spring assizes following Hilary Term, W. B. Heward, Esq., with whom the affidavits and papers on which the rule was moved were filed, was ordered by one of the judges to send them to the said assizes, to be used in a cause to be then tried: that on the return of the rule the affidavits and papers could not be found, and were not found until the 16th of January, 1864, when this deponent found them in Mr. Heward's possession, who produced them to him: that the said rule was to set aside two interpleader orders (of the 13th and 30th January, 1863): that in consequence of the loss of the papers the rule was not argued, though moved absolute, but no judgment was given, as the court would not receive certain copies of the said affidavits and papers which were offered on behalf of the claimant.

14. Affidavit of W. B. Heward, (sworn 10th February, 1864,) that he is one of the clerks of this court: that the papers and affidavits on which the rule *nisi* was obtained in Hilary term, 1863, to set aside two interpleader orders made in Chambers [part of the sentence was struck out, leaving it incomplete, the apparent meaning being that these papers, &c., were filed when the motion was made]: that during the spring assizes, 1863, he was ordered by Mr. Justice Connor to send all those papers and affidavits to the



assizes, to be used thereat, and he enclosed the same to William A. Campbell, the clerk of assize: that he never saw them again until the 16th of January, 1864, when he found them on the files of this court under the letter G., and the topmost of the papers on said files: that he had before repeatedly searched the said files and every place under his control for these affidavits and papers, but ineffectually; that he believed the papers were clandestinely put under the letter G. in the said files.

15. Affidavit of George James, that on the 16th of January, 1864, he served a notice on the plaintiffs' attorneys that the missing papers were that day found, and that they would be held liable for the money taken out of court by them, as well as for other damages to the claimant.

All the foregoing affidavits were marked filed on the 12th of February, 1864, when the rule *nisi* was moved. Excepting the last three, they had all been filed either in court or in Chambers, on one or other of the motions or applications in the cause. Those numbered 1, 3, 4 and 5, were marked filed on the 12th of February, 1863, as well as on the 12th of February, 1864. That numbered 6 was marked filed on the 12th March, 1863, as well as on the 12th of February, 1864. The word "March" was perhaps a mistake, as the affidavit was sworn on the 11th of February, 1863.

There was also an indenture marked filed both on the 12th of February 1863 and 1864, as follows:—"This indenture, made the first day of June, in the year of our Lord one thousand eight hundred and sixty-one, between William Henry Salt, of the city of Toronto, hatter and furrier, of the first part, and John Salt, of the same place, hatter, of the second part. Whereas the said party of the first part owns the stock-in-trade in the store on the south side of King street, in Toronto, in which he carries on the business of a hatter and furrier, and has proposed to the party of the second part, to induce him to assist in conducting said business, to give him for his time one third of the profits to be made in said business, he, the said party of the first part, to supply all stock from time to time during such partnership. The party of the second part agrees to

give all his time and attention to the said business, and to conduct the same in a careful and diligent manner, for which he is to receive one third of the profits as aforesaid; the said partnership to continue for one year from the date hereof, the profits, if any, to be ascertained and divided at the termination of the year. And the said parties for themselves, and each for himself, their and each of their heirs, executors and administrators, mutually covenant with each other to perform their part of this agreement."

This appeared to be signed and sealed by each of the parties. There was no subscribing witness, and no proof of the execution, but on it it was endorsed,

"In the Queen's Bench.

John Gaynor, D. E. B. MacDonald,	}	This is exhibit A. referred to in the affidavit of Wm. Henry Salt, sworn before me this se- cond day of Feb- ruary, A.D. 1863.
William Ambler, and Edward S. Danton,		
Plaintiffs.		
v.		
John Salt,	Defendant.	
(Signed)	John B. Read,	

*A Commissioner in B. R., &c."*

There was no affidavit of either John Salt or William Henry Salt among the papers on which the rule to shew cause was granted.

The rule *nisi*, granted in Hilary Term, 1863, with an affidavit of service, and a summons dated the 25th of January, 1864, calling on the plaintiffs to shew cause in Chambers why the money paid out of court to the plaintiffs' attorneys should not be paid into court again, was also filed on moving for this rule.

On the 29th of February the claimant took out a rule *nisi* upon the foregoing motion, calling upon the plaintiffs and their attorney to shew cause, on the first day of next term, why so much of the interpleader order of the 30th of January, 1863, as restrained the action brought by the claimant, and then pending in this court, against the plaintiffs' attorneys in the execution, in respect of the

seizure of the goods, and as restrained the said claimant from further prosecuting the same, and from bringing any other or future action against the said attorneys or the said plaintiffs in respect of the said seizure, or any sale of said goods which might take place under the said order, should not be rescinded, upon the grounds:—

1. That the same should not have been made, because an order in the same cause, and in respect of the same seizure, had already been made upon the application of the said sheriff by the Honorable the Chief Justice of this honorable court, in the above cause, bearing date the 13th day of January, 1863:

2. Because the said order contains unusually stringent clauses prejudicial to the said claimant's rights of action, on grounds not contemplated by the statute in that behalf, and unjustly restrains all actions at the suit of the said W. H. Salt, as well against the sheriff as against the said plaintiffs and their attorneys, for the consequential damages sustained by the said W. H. Salt in his trade and circumstances, for the wrongful and unwarrantable acts of the said sheriff and said plaintiffs and their attorneys, committed in respect of the said goods, as appears upon the affidavits and papers filed, not only on the occasion of the seizure of the said goods, but subsequently thereto, and continued up to the time of the application of the said sheriff for such interpleader order of the said 30th day of January, 1863:

Or why a certain rule *nisi*, granted on the seventh day of March last, to rescind the said orders of the 30th day of January, 1863, and of the 13th day of the same month and year above mentioned, or for such other relief as therein asked on behalf of the claimant, should not be revived, and the said claimant have leave to call upon the plaintiffs and their attorneys, and the said sheriff, to answer the same; on the ground of the affidavits and papers upon which the said rule *nisi* was obtained having been missed from the files of this Honorable Court until, and up to, and on the 16th day of January last past, when they were found by William B. Heward, Esquire, a clerk of this honorable court, as appears by his



affidavit and that of George James, the attorney for the plaintiff, filed on this motion :

And why this Honorable Court should not now make such order in the premises as in justice and equity may seem proper, upon the facts as disclosed in affidavits and papers filed ; or why this Honorable Court should not make such order in the premises, and as to costs, as the merits and justice of the case, as disclosed in the affidavits and papers filed, may seem to require.

Only one affidavit was filed on shewing cause, on the 31st of August, 1864, against this rule. It verified a copy annexed thereto of a summons in this cause, served on the plaintiffs' attorney, on the 20th of February, 1863, on behalf of W. H. Salt, calling on the plaintiffs and the sheriff of York and Peel to shew cause in Chambers why W. H. Salt should not have further time, to be fixed by the judge in chambers, within which to comply with the interpleader order of the 30th of January, 1863, an application being then pending before the court to have the said order rescinded or varied. It stated that this application was discharged : that no security in accordance with the terms of the order of the 30th of January, 1863, was furnished by W. H. Salt, either to the Sheriff or to the plaintiffs for their costs : that a certificate to that effect was duly given to the sheriff, upon which he proceeded, and sold the goods, and paid over the proceeds, or part thereof, to the plaintiffs' attorney, who, after having remitted the same to the plaintiffs, at the instance of the court procured a return of the same and paid it into court, where it remained until subsequently withdrawn upon a judge's order. This was sworn on the 24th of August, 1864.

*M. R. Vankoughnet* shewed cause. The claimant having availed himself of the judge's order by applying in Chambers for an extension of time to prepare the issue and furnish the securities, is not now in a position to move to rescind the other part of it. He must take the order in its entirety, not availing himself of part and rejecting the remainder. *Pearce v. Chaplin*, 9 Q. B. 802 ; *Hayward et*

al. v. Duffy, 6 L. T. Rep. N. S. 433; Giraud v. Austen, 1 Dowl. N. S. 703.

This being a motion to rescind a judge's order, in the nature of an appeal from it, no materials can be used that were not before the judge when the matter was heard in Chambers.—Cæsarini v. Ronzani, 31 L. T. Rep. 203; Hawkins v. Akrill, 1 L. M. & P. 242; Alexander v. Porter, 1 Dowl. N. S. 299.

The subsequent sale having taken place under the order, no action could be maintained for it—Abbott v. Richards, 15 M. & W. 194; Walker v. Olding et al. 7 L. T. Rep. N. S. Ex. 633; and the claimant should not now be let in to bring an action for the mere seizure, to recover nominal damages, especially where it does not appear that the property was the claimant's. He has forfeited the right now to shew it by not taking the issue, and by allowing the goods to be sold has brought the damages on himself. Per Platt, B., in Winter v. Bartholomew, 11 Ex. 705. But the judge had complete power to make the order he did—Consol. Stats. U. C. ch. 30; 1 & 2 Wm. IV. ch. 58, the English Interpleader Act; Carpenter v. Pearce, 27 L. J. Ex. 143, recognised in Buffalo and Lake Huron R. W. Co. v. Hemmingway, 22 U. C. R. 562. Again, the claimant having presented himself in two aspects, at one time claiming as a partner and again as sole owner, is not entitled to the consideration of the court. The execution creditor is not liable for the act of the sheriff, who is the agent of the law; and merely putting a *fi. fa.* in his hands neither makes the execution creditor or his attorney liable, unless they actually interfere, and it is not shewn that they did. Had there been an issue, the mere accepting that would not have made them liable—Wilson v. Tumman, 6 M. & G. 236; Wright v. Woollen, 7 L. T. Rep. N. S. 73; Kennedy v. Patterson, 22 U. C. R. 556; see also Jessop v. Crawley, 15 Q. B. 212; Hollier v. Laurie, 3 C. B. 334; Booth v. Preston & Berlin R. W. Co., 3 P. R. 90. On the first ground mentioned in the rule *nisi*, that the second interpleader order should not have been made, the claimant, by giving a second notice after the first order, threatening the

sheriff with an action, brought that about himself; and having appeared to the summons and filed affidavits in support of his claim, it does not lay with him now to object to that order.

*M. C. Cameron, Q. C., contra.* The principle of the cases with regard to a party's being obliged to take a judge's order in its entirety does not apply, because here the order was forced upon him; he did not seek it. Though *Carpenter v. Pearce* cannot be disputed after having been recognised in this court, it is contended that it does not extend to the case of attorneys, who may not be entitled to the same protection as the execution creditor, and the language of the interpleader act, Consol. Stats., U. C. ch. 30, certainly does not extend the protection afforded beyond the case of sheriffs, for whose benefit alone the act was intended. He cited *Cater v. Chignell*, 15 Q. B. 217; *Slowman v. Back*, 3 B. & Ad. 103; *Brown v. Ludham*, 6 M. & G. 169, S. C. 6 Scott N. R. 934; *Ford v. Dilly*, 5 B. & Ad. 885; *Bowdler v. Smith*, 1 Dowl. 417; *Perkins v. Burton*, 2 Dowl. 108; *Towgood v. Morgan*, 3 Tyr. 52, note *a*.

DRAPER, C. J.—There has been a misapprehension in drawing up this rule. It was expressly stated that the court would not grant the rule so as to bring the sheriff's position into question. Now the second alternative in the rule has this effect, for it asks to revive the lapsed rule of Hilary term, 1863, and to call upon the sheriff to answer it, the effect of which would be to call upon the sheriff to support the order of the 13th of January, 1863, by which, although his summons for an interpleader order was discharged, he was protected from any action by the claimant for the seizure of the goods claimed. This protection was the principal, if not the sole objection to that order, and I made it because the affidavit of the claimant in support of the claim was sworn in New York, before a person whom I could not judicially recognize as having authority to take it; and, if I remember right, there had been ample time to send instructions to New York on this point. The interpleader summons had been granted about the end of December, 1862, and it was a



full fortnight afterwards that I discharged it, as there was nothing before me sufficient to shew the nature and particulars of the claim. The protection of the sheriff was therefore a matter of course. We cannot, in my opinion, take notice of this branch of the rule.

The first branch of it seeks to set aside so much of the interpleader order of the 30th January, 1863, as restrained an action brought by the claimant against the plaintiffs' attorneys for the seizure of the goods claimed, and restrained also the bringing an action against the plaintiffs, or their attorneys, for such seizure or the subsequent sale.

Two grounds are taken in support of this application:—1st, that an order in the same cause, and in respect of the same seizure, had already been made upon the application of the sheriff, on the 13th of January, 1863; and, 2nd, that the order contains unusually stringent provisions prejudicial to the claimant's right of action, on grounds not contemplated by the statute, and unjustly restrains all actions at the suit of the claimant against the sheriff, and against the plaintiffs and their attorneys, for the *consequential* damages sustained by the plaintiff in his trade and circumstances by the seizure of the goods, and subsequently thereto, up to the application for the interpleader order of the 30th of January, 1863.

As to the first ground.—The claimant, through an agent, gave the sheriff notice on the 27th of December, 1862, that the goods seized were the partnership goods of John Salt & Son, and that the claimant claimed them as principal partner in the business, and that he was the owner of the goods seized in the store of John Salt and Son. On this notice the first interpleader summons was granted, and was discharged, as already stated, on the 13th of January, 1863.

On the 15th of that month the claimant by his attorney gave a second notice to the sheriff, that the goods seized were the "sole and individual property" of the claimant, who was stated to be then resident in New York, and that he claimed these goods as owner. The sheriff thereupon obtained a second interpleader summons, on which the order of the 30th of January was made. If it was open to the

claimant to lay a new foundation for an action against the sheriff for seizing these goods, it was surely open to the sheriff to apply for an interpleader on this new claim. The claimant cannot set up the order discharging the first summons, (which order is in some of the affidavits erroneously termed an interpleader order) as a bar to the sheriff's second application, for if the whole subject matter had been disposed of on the first claim and summons, he should not have made a different claim; or if he might do so, or if there had been a second seizure, the sheriff had a right to protection under the Interpleader act. This ground appears therefore to be untenable.

As to the second.—This court has decided, in *The Buffalo and Lake Huron Railway Company v. Hemingway*, (following the decision in *Carpenter v. Pearce*,) that a judge may by an interpleader order restrain an action against the execution creditor, as well as against the sheriff, for the seizure of the goods taken in execution. The present order however does more, for it also restrains any action on the same account against the attorneys for the execution creditors. I have heard no reason advanced to satisfy me that if the principal can be protected, the attorneys may not also. The protection against an action for the sale of the goods is even less open to question, for the interpleader order afforded the claimant the means of preventing a sale.

Independently of this, however, there are two very serious objections to granting what is asked. The claimant obtained and served a summons, dated the 26th of February, 1863, for further time to comply with the conditions imposed on him by the order of the 30th of January, thus so far recognising and adopting the order. Then this rule to rescind a part of that order was not applied for until rather more than a year after the order moved against was granted, and, in accordance with English authority, we held in the case above referred to, that an application against a judge's order was too late if delayed until after the lapse of four terms. It is true that the claimant obtained a similar rule in the term next after the order was made, but that rule

was dropped, owing, as we are informed, to the loss of the affidavits and papers, or some of them, on which it had been granted; and the present application was moved in last Hilary Term, and shortly after the papers, &c., were found.

But after a close examination of all the papers now before the court, I can perceive no ground for holding that the sheriff had not a right to seek the protection of the Interpleader Act after being served with the second notice of claim, and if so, it was for the judge granting it to impose such conditions as the particular circumstances properly called for. I observe that the order of the 30th of January, 1863, is drawn up on reading the affidavits of the claimant and of the execution debtor, neither of which is among the papers before us; though I find the deed of partnership, with the memorandum endorsed on it, as above stated.

It is further to be remembered, that this rule was moved for when the time for compliance with the conditions imposed on the claimant by the interpleader order had not expired, and that an application to extend that time was unsuccessfully made to a judge in Chambers, and the period limited has long since elapsed. By rescinding that part of the interpleader order to which the claimant objects, we should in effect rescind the order altogether, and throw open the whole subject matter, except so far as the protection of the sheriff under the order of the 13th of January; for the order to interplead has become nugatory through the claimant's default, and he would be in a situation to resort to the original seizure as a ground of action against the execution creditors and their attorneys, instead of simply trying the right to the goods claimed by him; and so he might urge a claim for consequential damages arising from acts done even in accordance with the interpleader order, and arising subsequently to its being granted—damages, in short such as under an ordinary interpleader order, not preventing an action against the execution creditors if they were unsuccessful on the feigned issue, they might not be liable to.

I have felt no hesitation but that created by the papers being mislaid and the abandonment of the first rule, which



I assume took place in consequence thereof. This case tends to shew the inconvenience of permitting original papers to be removed from the files of the court, and sent, as is frequently the case, almost as a matter of course, to any assize town in Upper Canada, where it is supposed they may be used on some expected trial. I am inclined to think this practice should be rigidly limited to cases where nothing but the original papers can be of use, and even then where the party applying to have them so transmitted has some right in them, or where the interests of public justice indispensably require such transmission; and then every precaution should be taken for their security and safe return to the proper custody. The officer who sends them away should have some voucher for what he sends from the officer who receives them. In the present case, we have no list of what was taken from the files to the assizes, and when there they appear to have been placed in the hands of parties who are not shewn to have had any right to them; and how they got back nobody knows, nor whether the whole or only a part have been returned.

But as, after reading all that is before us, I am not satisfied that I should not have made the same order as that complained of, I could not agree in making this rule absolute, even if no other difficulties presented themselves. I think it must be discharged.

HAGARTY, J., and MORRISON, J., concurred.

Rule discharged.

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### FELL V. SOUTH.

*Canada Company—Proof of conveyance from—27 & 28 Vic., ch. 100.*

*Held*, that under the 27 & 28 Vic., ch. 100, a deed from the Canada Company, dated February 17th, 1835, in the form given by the Imperial Act, 9 Geo. IV., ch. 51, and under the seal of the attorneys of the company, was proved by its mere production, and was sufficient to pass the fee.

EJECTMENT for lot No. 11, in the second range south of Dundas Street, in the township of Toronto. The plaintiff

claimed under a conveyance from one Robert Marchant, to himself and one George Frederick Maule. The defendant claimed under a demise from one Lucy Godby.

At the trial, at Toronto, before *John Wilson, J.*, it was admitted that the patent issued to the Canada Company before the 17th of February, 1835.

A conveyance from the Canada Company to Robert Marchant, dated the 17th of February, 1835, was put in, which the plaintiff contended proved itself under the late act 27 & 28 Vic., ch. 100.

A deed was then put in and proved from Robert Marchant and wife to the plaintiff and George Frederick Maule, dated the 11th of May, 1837.

Several objections were taken to the proof of the deed from the Canada Company, which were overruled, and the plaintiff had a verdict.

The deed was in the form given by the Imperial Act 9 Geo. IV., ch. 51, the conclusion being, "In witness whereof we, the said William Allan and William Dunlop, have hereunto subscribed our hands, as attorneys of the said Canada Company, and affixed our seal of office, at the City of Toronto, in the Province of Upper Canada, this seventeenth day of February, in the year of our Lord one thousand eight hundred and thirty-five." It was signed by the two attorneys, and the seal affixed bore the legend, "The seal of the Attorneys of the Canada Company."

*Robert A. Harrison*, obtained a rule *nisi* for a new trial on the law and evidence, on the grounds :—

1. That there was no proof of the deed from the Canada Company to Robert Marchant :

2. That the deed, even if proved, does not in law operate as a conveyance of the land therein mentioned from the Canada Company to Robert Marchant :

3. That notwithstanding said deed, the land therein mentioned, and in the writ described, was and is the property of the Canada Company, and not of the plaintiff :

4. That there was no proof of the fact that the persons who assumed to execute the said deed as the attorneys of the Canada Company were such attorneys :

5. That there was no proof of the execution of the said deed by the said alleged attorneys :

6. That such deed purports to be a conveyance of the land therein mentioned from the attorneys of the Canada Company, and not from the Canada Company by their attorney :

7. That there was no proof of the seal to said deed affixed, or as to the sealing of the said deed with said seal.

8. That said seal to said deed does not on the face of it purpose to be the corporate seal of the said company, or the official seal thereof, but only the seal of the attorneys of the said company :

9. That there was no proof of the right of the said alleged attorneys to use the said seal, or that the same was the seal of the company now or heretofore used by the attorneys of the said company in this province.

*Alister Clark* shewed cause. *Robert A. Harrison* supported the rule.

6 Geo. IV., ch. 75 ; 9 Geo. IV., ch. 51—Imperial Acts ; 27 & 28 Vic., ch. 100 ; *Woodhill v. Sullivan*, 14 C. P. 265, were referred to on the argument.

DRAPER, C. J., the grounds of objection urged on behalf of the defendant resolve themselves with two questions.—1. Does the deed from the Canada Company to Marchant operate to pass the fee to him ?—2. Has it been properly proved ?

As regards the first point, there can be no doubt that the deed in question complies with the requirements of the Imperial Statute 9 Geo. IV. chap. 51, and under that statute is properly executed by the attorneys of the Company ; and being in the very language and form prescribed therein, we must hold that the company effectually conveyed all their estate in the land to Marchant.

With regard to the second question raised by this rule, the Canadian Statute 27 & 28 Vic. ch. 100, provides “that any deed and conveyance, or written instrument, purporting to be under the corporate seal of the said Canada



Company, or under the official seal of the said Canada Company \* \* shall be receivable in evidence as *primâ facie* proof in any court of justice, \* \* that such deed, conveyance, or written instrument, has been duly executed by the said Canada Company or by their attorneys, as the case may be, without any proof of the said corporate or official seal as aforesaid, or of the signature or appointment, or of the official character, of the person or persons appearing to have signed the same."

And if we compare with the enactments of this statute the language of the Imperial Act already quoted, and of the Imperial Statute 6 Geo. IV. ch. 75, all of which being *in pari materiâ* must be read and construed together, we shall have little difficulty in assuming that the seal appended to the deed in question was the seal in use by the attorneys of the Canada Company; and the conclusion is inevitable that the deed to Marchant has been sufficiently proved.

The rule must therefore be discharged.

HAGARTY, J., and MORRISON, J., concurred.

Rule discharged.

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## MEMORANDA.

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During this term the following gentlemen were called to the bar:—ALEXANDER ROBERTSON, JAMES KEITH GORDON, NICHOLAS MURPHY, WILLIAM HENRY RICHEY ALLISON, GEORGE MONCRIEFF, JOHN PETER McMILLAN, JAMES DAVID EDGAR, JAMES HOSSACK, JOHN YEATS ELWOOD, ALFRED HECTOR, ANDREW GREGORY HILL, RUSK HARRIS, CHARLES SAMUEL JONES, GEORGE DEAN DICKSON, CHARLES HEYHOE GILMAN.

HILARY TERM, 28 VICTORIA, 1865.

(February 6th to 18th.)

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*Present:*

THE HONORABLE WILLIAM HENRY DRAPER, C. B., C. J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

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CLARK V. STEVENSON.

*Dower—Plea of release—Secondary evidence of—Previous ineffectual release—Admissibility of evidence relating to—Pleading—Tenant held bound to call the demandant.*

In an action of Dower defendant pleaded that by deed of the 21st of August, 1837, the husband conveyed the land to T. C., and that on the 23rd of April, 1850, the demandant, by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined.

The release of the 23rd of April, was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark; and the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence of his handwriting: See *Clark v. Stevenson*, 22 U. C. R. 575. The defendant therefore proved the execution of the deed of the 21st of August, 1837, which was executed by the demandant, though she was no party to it, and it contained no release of dower. A certificate of two justices was endorsed, dated 2nd March, 1850, that the demandant had appeared before them and duly barred her dower, and one of them proved that she was examined, executed the deed, and received \$10. T. C., the grantee, proved that she agreed to bar her dower, and that he took her to the justices for that purpose, but finding that the proceeding before them was ineffectual, he had the release of the 23rd of April, 1850, prepared, and sent it to her by defendant, with a note for \$40 which he held against her husband, to be kept if the release was executed, otherwise returned; and that T. C. brought back to him the release apparently executed, but not the note. This evidence was received, (though objected to,) as tending to strengthen the probability that the release really was executed; it being also sworn, in confirmation, that the demandant's name to the release was written by her husband: that in May following the demandant told a witness that defendant had been to her to sign a paper for T. C., which she had signed; and that next day she told defendant she had no rights there. The jury found for defendant.

*Draper, C. J.*, doubted whether there was sufficient to go to the jury as evidence of the execution of the release; but *Held, Morrison, J.* concurring, that defendant, being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have given the best, notwithstanding her adverse interest; and that the verdict must therefore be set aside.

*Morrison, J.*, thought the evidence objected to inadmissible, as being irrelevant to the issue.

*Hagarty, J.*, dissented, holding that the evidence was properly received as forming part of the history of the whole transaction, and tending to shew why the release was for a nominal consideration only, and in a form implying a previous conveyance of the fee, which might otherwise have given rise to suspicion;—and that defendant was not bound to call the demandant.

See the report of this case 23 U. C. R. 525, when a new trial was granted.

The second trial took place in October, 1864, at the assizes for York and Peel, before *John Wilson, J.*

The execution of the deed of 21st August, 1837, was proved as on the former trial.

John Bogart, Esq., was sworn. His evidence was objected to as not relevant to the issue taken, but was received subject to the objection. He stated that a person calling herself Martha Clark acknowledged before him what his certificate, dated 2nd March, 1850, states. She refused to do this until a sum of money was paid to her, but Mr. Bogart could not state the amount. Eli Gorham, Esq., the other justice of the peace who signed the certificate of this acknowledgment, stated that the name "Martha Clark" opposite to a seal on the face of the deed of August, 1837, was written by him: that she made her mark to it, and acknowledged that she was willing to bar her dower, and was examined on this point before the two justices apart from her husband. He thought that \$10 was paid to her.

Thomas Clark, the grantee in the deed of 1837, swore that he paid the demandant \$10 on the occasion mentioned by the two justices: that he afterwards learned this was not a valid release, and he then got the deed poll of the 23rd of April, 1850, prepared, and sent it by this defendant to the demandant and her husband, in order that they might execute it, and he sent also a note for \$40 which he held against the demandant's husband, to be given up to him if the deed was executed. The defendant brought back the



deed apparently executed by the demandant and her husband, and the note for \$40 had never been returned to Thomas Clark. The defendant was at that time tenant to Thomas Clark, of the premises out of which the dower was claimed. Clark also swore that the demandant was the person who appeared before Messrs. Bogart and Gorham, and that she got \$10 for signing that deed and for acknowledging that she barred her dower.

The defendant's counsel tendered evidence of the defendant's signature as a subscribing witness to the deed of the 23rd of April, 1850, which was rejected. The signature "Francis Clark," to this deed, and the name "Martha Clark," written as executing that deed, were both written by demandant's husband, Francis Clark.

It was further proved that in March, 1850, the demandant stated that she had signed away her dower in this land to Thomas Clark, and had been paid for it. She also told the same witness in May, 1850, that the defendant had been up to get her to sign a paper for Thomas Clark, and that she had signed it, and was to get in consideration some seed grain and two pigs. She said she had no rights in anything there. The witness who gave this evidence further said, on cross-examination, that the demandant and her husband, whose residence was then at a distance from the premises in question, stopped a night at the witness' house when this conversation took place, and she (the witness) gave a very strong reason for being certain that it was in May, 1850. Another witness confirmed the statement. Some evidence was also given corroborative of the assertion that the demandant and her husband did get two pigs and some wheat from Thomas Clark in 1850. In reply a son of the demandant was called, whose evidence went to disprove the assertion that his father and mother were, in May, 1850, at the house of the witnesses who swore to the acknowledgment made by the demandant.

The jury found for the defendant.

In Michaelmas Term *McCarthy* obtained a rule calling on the defendant to shew cause why a new trial should not

be granted, for the improper admission of evidence of the execution of the deed of the 21st of August, 1837, and of the certificate indorsed thereon, and of the alleged acknowledgment made before the magistrates by the demandant, and of the alleged admission of the demandant made prior to the date of the release pleaded, that she had barred her dower, such evidence not being pertinent to the issue joined, nor admissible in support thereof.

*McMichael* shewed cause.

DRAPER, C. J.—The pleadings raise no other material issue or question than whether the demandant did, on the 23rd of April, 1850, execute a deed jointly with her late husband, Francis Clark, and with his privity, consent and approbation, release her dower to Thomas Clark, who thereafter conveyed the lands to the tenant in fee; but by putting the whole plea in issue by a general replication, the defendant also puts in issue the conveyance made by Francis Clark to Thomas Clark on the 21st of August, 1837. The demandant therefore put it upon the defendant to prove this deed to have been executed by her husband. If the allegation in the plea was immaterial it should not have been put in issue.

But the defendant went further, and proved the ineffectual proceedings which took place on the 2nd of March, 1850, and by which it was intended to effect a bar of the demandant's dower. It is not contended that those proceedings were effectual for any purpose, so far as the demandant's right is concerned, nor are they pleaded, nor have they directly any bearing upon or connection with the material fact pleaded—namely, that on the 23rd April 1850 the demandant, by a deed executed jointly with her then living husband, barred her dower.

I am not at all clear that this was admissible, looking at the issue. It could only be so on the ground that it was among the surrounding circumstances which throw light upon a transaction, and strengthen the probability arising from other evidence that the fact in issue really existed; and presented in that light the inference sought to be deduced is, that inasmuch as on the 2nd of March, 1850, the demandant

signed a deed which had been executed by her husband in 1837, and went before two Justices of the Peace, and was duly examined by them, and acknowledged her consent to be barred of her dower, therefore it is probable, more or less so, that on the 23rd of April, 1850 she executed another deed for the same purpose, which deed is offered in evidence, upon the strength of this inference, upon proof that this deed was sent to the demandant, by the hands of the defendant, to procure her and her husband to execute it: that her husband did execute it, and that her name is written to it by him, and a mark (+) affixed; and upon further proof that in May, 1850, the demandant told a witness that the defendant had been up to get her to sign a paper for Thomas Clark, and that she had signed it and was to get a consideration for signing it, of the payment of which consideration there was some proof; but contradictory evidence as to this last matter was given.

If the question were to be decided upon the establishment of a moral conviction that the demandant received what she was content to take as a sufficient compensation for releasing her dower, and that this deed of the 23rd of April, 1850, was executed by the demandant, it might be well said that there was evidence to sustain such a conviction; but it is with extreme doubt that I yield to the opinion, that this evidence was legally sufficient to be submitted to the Jury for the purpose of sustaining the affirmative of the most material part of the defendant's plea, and though I have determined not to express a different opinion from my brothers, if they agree on this point in the defendant's favour, I cannot say that I have a clear opinion that the deed of April, 1850, is proved.

I wish however distinctly to add, that one great difficulty which presses my mind is the consideration that the defendant has not exhausted every source of direct evidence of the proof of this deed which was within his power, and therefore that I am the less inclined to treat the evidence, (which is secondary in its character) as sufficient to prove this deed. The defendant has the power of calling the demandant as a witness, and she certainly does know whether she signed this deed or no, and whether she or her husband received



the alleged consideration or no. This case is peculiar, and a similar one will scarce arise again. The defendant by his own act has lost the power of proving the execution of the deed by calling the subscribing witness, and he does not call the only other witness (so far as appears) who must know the truth. It is true that he has every reason to suppose her an adverse witness, but I apprehend he will have, as a consequence, a right to put leading questions, treating her rather as on cross examination than as in chief. I am not prepared to adopt as the sound view, that because he has strong reason, the strongest, for supposing her to be adverse, that he can call upon the court to assume that she will not speak the truth, and therefore that he is not bound to call her: that he can deprive the Jury of hearing the testimony of the only person who knows the fact, because he expects or fears she will swear falsely. No court can in my humble judgment sanction such a presumption, or admit the fears or suspicion of a party to a cause as a reason for withholding a witness whom that party alone can call, and who in the particular case is the only person cognizant of the facts and competent to give evidence with regard to them.

This point was not pressed during the argument, but I have felt compelled to consider it, and the more I have done so the stronger has been my opinion that the defendant was bound to have put the demandant in the witness box. I cannot on this ground uphold the verdict, but think there should be a new trial, costs to abide the event.

No question was raised or suggested whether the admissions of the wife, in the presence of her husband, and possibly under his control, could be treated as sufficient to bind her rights or to establish the execution of the deed by her.

HAGARTY, J.—To the claim for dower defendant pleads that by deed of August, 1837, Francis Clark, demandant's then husband, conveyed the land in fee to Thomas Clark, and afterwards, on the 23rd of April, 1850, the demandant, by deed jointly executed by herself and her husband, Francis, and with his privity, released her dower to Thomas Clark, and Thomas Clark afterwards by deed conveyed the land to defendant.

The demandant takes issue on this plea. Defendant has consequently to prove every material part and allegation.

The whole question at the trial was, of course, whether such dower had been released as pleaded.

Defendant produces an instrument purporting to be executed by demandant and her then husband, and to release her dower. If proved, no doubt this instrument would fully prove the plea. The only witness is the present defendant, and this court has decided that proof of his handwriting cannot be received.

Being unable to prove the deed in the usual way, (the demandant, to increase the difficulty, being a markswoman) defendant resorts to secondary evidence, or perhaps I should say to the next best evidence he can give. He proves that both the names Francis and Martha Clark are in Francis' writing.

She claims dower through Francis. The plea, denied by her, avers that Francis had years before sold to Thomas. The alleged release is of peculiar frame, and only explicable on the assumption that the legal estate had been previously conveyed, and that the release of dower would be to the person already owning the estate. For this reason, and under the words of the plea, it was proper to put in evidence the original conveyance of 1837 by Francis to Thomas. When produced it bears upon its face the signature and seal of Martha Clark, although she is not a party to it in terms, and indorsed upon it, as of the date 2nd March, 1850, about six weeks prior to the date of the release pleaded, is a certificate from two justices in legal form, declaring that Martha Clark had appeared before them and duly barred her dower. The judge (against objection) allowed the magistrates to prove that she did go through this form, and one of them said that he wrote her name to the deed, and she acknowledged it, and put her mark to it; and both proved that she received money therefor, \$10. Thomas Clark, the grantee, proved that he applied to her to bar her dower: that she agreed; and that he brought her to the justices, and paid her \$10. Afterwards he found out it was not properly done, and he got Lount to prepare the deed of

release, and sent it to her by the now defendant, who then was his tenant, and a note he had of \$40 against Francis, telling him to give him the note if he would execute the release, otherwise to be returned. Defendant brought back the release apparently executed, and the note was never returned to him; he also sent \$1.

Another witness proved her acknowledging in May that defendant Stevenson had been to her to sign a paper for Thomas Clark, which she had signed, and she was to get some seed grain and two pigs for it; and she went next day to defendant and told witness she had no rights there, that she had signed all away.

The alleged release appears to have been registered on the 22nd of May, 1850, about a month after its date. I presume this must have been done on the oath of Stevenson, then, as I understand, a disinterested witness.

In *Gibson v. Hunter*, in the House of Lords (2 H. Bl. 288), A. drew a bill on B., payable to a fictitious payee or order, indorsed in the name of such payee, which B. accepts. An innocent holder for value sues B. In order to draw the inference that B. knew the name of the payee to be fictitious, or that he had authorized A. to draw bills on him payable to fictitious persons, evidence was admitted of irregular and suspicious transactions and circumstances relating to other bills by A. on B., payable to fictitious persons and accepted by B., though none of those transactions or circumstances had any apparent relation to the bill in question, and though none of them proved that B. accepted any of these other bills with knowledge that the payees mentioned in them were fictitious. The majority of the judges, together with the Lord Chancellor and Lord Kenyon, declared that they thought the evidence ought to have been received and left to the jury. No reasons are given.

In *Llewellyn v. Winckworth* (13 M. & W. 598), an action against defendant as acceptor of a bill accepted by another for him, the plaintiffs gave some evidence of general authority to accept bills from defendant to the person who wrote his name, and evidence was received of an admission by defendant of his liability on another bill similarly accepted,



and the court held it admissible as confirmatory of a general authority.

In *Beavan v. McDonnell* (10 Ex. 184), the contest was whether defendant at the time of contracting with the plaintiff knew that the latter was a lunatic. Evidence was received of the plaintiff's conduct with other persons, before and after, to shew that the malady was such as would make itself apparent to defendant in dealing with him. *Martin, B.* says, "This is a matter depending not so much upon any rule of law as upon the rule of common sense, by which a party is entitled to submit all such facts to the jury as are reasonably relevant to the issue. The plaintiff had a right to prove every fact which would lead the jury to the particular conclusion to which he sought to lead them. \* \* The question is one of degree only."

The same learned judge says, in the late case of *Sheen v. Bumpstead* (7 L. T. N. S. 468), "I apprehend the rule of law upon the subject to be, that all facts and circumstances which afford a fair presumption or inference as to the question in dispute, and which may fairly and reasonably aid the jury in arriving at a just and true conclusion, are admissible, and that the true principle is to extend rather than to restrict the admissibility of evidence." He refers to *Starkie on Evidence*, 78.

The case of *Hollingham v. Head* (4 C. B. N. S. 388), is very instructive, shewing how certain evidence offered was clearly inadmissible, both as violating the maxim "*res inter alios acta alteri nocere non debet*," and as not pointing to or relevant to the issue. It was attempted to shew that a contract for the sale by plaintiff to defendant of guano was subject to a condition as to quality, by proving that the plaintiff had sold guano to other persons with such a condition. *Willes, J.*, suggested that if such evidence were receivable, then in an action for assault the plaintiff might give evidence of former assaults by defendant on other persons, to shew that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was true. He says, "It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation

begins; but we are bound to lay down the rule to the best of our ability. \* \* Now it appears to me that the evidence proposed to be given in this case, if admitted, would not have shewn that it was more probable that the contract was subject to the condition insisted upon by defendant. The question may be put thus—Does the fact of a person having once or many times in his life done a particular act in a particular way, make it more probable that he has done the same thing in the same way upon another and different occasion?" He then cites, with great approbation, the rules laid down in *Best on Evidence*, 2nd ed., p. 14: "There is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision, but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required." He then cites *Egerton's case* (Russ. & Ry. C. C. 375.) There the prisoner was charged with extorting money by a threat to charge the prosecutor with a certain offence; and the prosecutor was allowed to give evidence of another ineffectual attempt by the prisoner to obtain money from him by similar threats, in order to shew the intention of the prisoner in making the demand. "The evidence" (*Willes, J.*, says) "there was admissible, because it was all part of one persecution of the prosecutor. It was relevant to the matter in issue, as shewing the nature and character of the transaction in question."

In *Rex v. Ellis* (6 B. & C. 145) on a charge of stealing 6s. from a till which contained marked silver, evidence was allowed of the prisoner going on various occasions to the till, and that on each examination thereof the money appeared diminished. It was objected that several felonies could not thus be proved. *Bayley, J.* says, "Where several felonies are connected together and form part of one entire transaction, then the one is evidence to shew the character of the other. Now all the evidence in this case tended to shew that the prisoner was guilty of the felony charged in the indictment. It went to shew the history of the till from the time the marked

money was put into it up to the time when it was found in the possession of the prisoner." *Holroyd*, J. assented, and mentioned his ruling in *Egerton's* case, cited before, and added that he had the opinion of the other judges that he was right in his view.

Mr. Taylor says, in his work on Evidence, 4th ed., sec. 298, 298 A, "The rule excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute. \* \* The most important class of facts which are excluded on the ground of irrelevancy, are the acts and declarations, either of strangers, or of one of the parties to the suit in his dealings with strangers," the reason assigned being that such things "can never afford a safe criterion by which to judge of the behaviour of another man similarly situated, or of the same man towards other persons." In sec. 300, he says "These words point out an exception to the rule under discussion, in favour of the admissibility of facts which, though collateral, are proved to be connected by some general link with the matter in issue. This exception has been recognized in numerous cases." Again, in sec. 314, "Collateral facts are only excluded when they cannot raise any fair inference respecting the matter in issue," &c., &c.

In Phillipps and Amos on Evidence, 8th ed., p 482, it is said, "It may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction which is the immediate subject of enquiry, into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives or intentions. The case of *Hunter v. Gibson*" (already cited) "affords an instance of this kind."

In Starkie on Evidence (ed. of 1853) page 618, it is said, "Although remote and collateral facts, from which no fair and reasonable inference can be drawn, are inadmissible, since they are at best useless, and may be mischievous, because they tend to distract the attention of the jury, and frequently to prejudice and mislead them; yet, on the other hand, all facts and circumstances are admissible in evidence which are in their nature capable of affording a



reasonable presumption or inference as to the disputed fact. It is the province of the judge, in the exercise of a sound discretion, to discriminate between such facts as are connected with the issue and such as are merely collateral."

In the edition of Starkie of 1853, page 78, (referred to by *Martin, B.*) the subject is treated at large.

In *Ford v. Elliott* (4 Ex. 78) in trover by assignees of a bankrupt, it appeared that the goods had been assigned by the bankrupt to B., who assigned to C., to whom the purchase money was alleged to have been advanced by the plaintiff. To shew the whole thing fraudulent it was held proper to ask whether C. had not claimed the goods after the bankruptcy. *Alderson, B.* says, "The evidence was admissible as an act done by one of the parties to the transaction. It was admissible as evidence; it is altogether another question what weight it would have had with the jury."

It is true that under our present system either party may call the other to prove his case. In a matter like the present I hardly see how to allow this to affect my judgment. The plaintiff, for reasons I presume satisfactory to herself, declines to call him or to accept him when tendered as a witness for himself. The defendant, if satisfied that the plaintiff is bringing an action aware of having executed the release, may consider her on that account an untrustworthy witness.

My impression is very strong that on such an investigation the judge did right in allowing the history of the whole transaction to be given. It is quite true that the point was, whether she had given a valid release, but the jury in my view were entitled to have the whole matter fully laid before them, occurring as it all did within a few weeks between the same parties, and all relating to the claim of dower and the purchaser's attempts to obtain its release.

I do not think it open to the objection of being *res inter alios acta*, and that it is a fallacy to urge that maxim in this case. It was all between the same parties, all bearing on the one subject matter.

A defendant attempting to prove by secondary evidence that such a document as this release was executed, except on the presumption of some prior dealings between the parties,

might give rise to grave suspicions. It is for a nominal consideration of 5s., and in a form not resorted to except a previous estate had been actually conveyed. Might it not reasonably aid the enquiry, that a few weeks prior to its date the releasee had actually paid her \$10 for her dower, and she had done an act, viz., going before the justices, testifying her willingness to release it to him? I think this was a fact connected with the issue, not merely collateral to it.

Had the demandant been called upon, as she might be in England, to prove her own case, I think she might certainly have been asked to tell everything that happened between her and Thomas Clark. Had defendant's solicitor, cognizant of the whole transaction, been called, I think he could be asked and might tell everything that took place from the beginning of his attempts to procure a release from demandant down to the drawing the release sought to be proved, and the giving it to Stevenson, the witness, to get it executed, and the latter's bringing it back apparently executed. He could, I think, narrate the whole as the narrative of one entire transaction. To test this, counsel might suggest: Why should demandant release her dower for a nominal consideration? Because she had received \$10 six weeks previously for the ineffectual attempt so to do: Why was the release drawn in that peculiar form to Thomas Clark? Because the latter had previously received a formal conveyance of the fee simple from demandant's husband.

On an investigation like this, involving the question, did demandant really execute this release for this nominal consideration, is it admissible evidence that she admitted having signed a paper brought to her by defendant, coupled with proof that such a paper had been given to defendant expressly to take to her and procure her execution\* of it, and that he brought it back apparently executed? I cannot consider that it could possibly be held to be irrelevant or foreign to the issue, to prove that she had said the day before or a month before its apparent date, that she had been paid for her dower, and was always ready to sign a

release whenever the purchaser would send it to her for execution. I think it would be most unfair to the jury to withhold such testimony from them; and yet it should be rejected if the evidence here attacked be inadmissible. I think such evidence comes emphatically within the definitions of the text-writers adopted by *Martin, B.*, as "affording a fair presumption and inference as to the question in dispute, and which may fairly and reasonably aid the jury in arriving at a just and true conclusion."

I may add that if I felt any reasonable doubt in the matter, I should still hesitate to decide that the judge at the trial had so erred in admitting the evidence that the verdict should not stand. In all doubtful cases I would lean rather to the admission than the rejection of such evidence, believing, in the words used by the court, that "the true principle is to extend rather than to restrict the admissibility of evidence."

I think all the evidence received was admissible, and that the rule should be discharged.

As bearing on the general question, I also refer to *Holcombe v. Hewson*, 2 Camp. 391; *Regina v. Dossett*, 2 C. & K. 306; *Backhouse v. Jones*, 6 Bing. N. C. 65; *Blundell v. Howard*, 1 M. & S. 292.

MORRISON, J.—The question for the jury upon the trial was, whether the demandant executed the alleged deed of release of the 23rd of April, 1850. I am of opinion that there was not sufficient evidence to prove the execution of that deed, or to justify a verdict for the tenant.

The fact of Thomas Clark handing the deed produced to the tenant to have it executed by the demandant, and his returning it to Clark apparently signed by her, by itself proves nothing; and taking it in connection with the statement of the demandant in a conversation had in May, 1850, with a witness who had no interest in the matter, that she, the demandant, had signed a paper for Thomas Clark which the tenant had been up to get her to sign, without stating the purport, contents, or nature of the paper, is, in my judgment, not sufficient proof that the demandant executed



the deed of April, 1850. If any evidence, it is of so slight a character that the jury should be directed that it would be most unsafe to deprive a person of her estate upon such testimony. I think it highly improbable that upon such evidence alone a jury would find in favor of the release.

In this case, however, before evidence of the facts I have referred to were given, the tenant gave as evidence the testimony of the two magistrates, who proved that on the 2nd of March, 1850, the demandant appeared before them for the purpose of barring her dower in the lands in question: that they examined her apart from her husband, and that she was willing to bar her dower; and that she put her mark to a deed of the property executed by her husband in 1837; and that the justices indorsed on the deed the usual certificate, that the demandant consented to be barred of her dower; and that she was paid some money at the time for so doing. Thomas Clark and his wife were also examined to corroborate the evidence of the justices, and to identify the demandant as being the person who appeared before them. This evidence was objected to by the demandant's counsel as being irrelevant and not bearing on the issue, and the learned judge received the testimony subject to the objection.

I am of opinion that the objection was well taken, and that the evidence ought to have been rejected. As the case stood, it had no connection with the alleged execution of the release of April, 1850, but it was well calculated to mislead and prejudice the jury against the claim of the demandant. The question was not whether the demandant was likely to have executed another release of dower, but whether in fact she executed the release of April, 1850. If there had been conflicting evidence as to the execution of that deed, or testimony had been adduced to shew that it had been improperly obtained, or if some question arose respecting the amount of the consideration, I am not prepared to say that the evidence would not have been admissible; but as there was no evidence given of the execution of the deed, or that it was ever presented to the demandant for execution, or seen by her, or of any admission of hers pointing to it,

I see no foundation laid for the introduction of the evidence, either for the purpose of raising a presumption in favor of the release of April, 1850, being duly executed, or for giving additional weight to the probability that the demandant did execute it.

I concur in the remarks made by the learned Chief Justice with regard to the tenant calling the demandant as a witness, and examining her as to the execution of the release. It may be said that it is unusual by a suggestion from the court to compel a party to resort to such a step, but this is a very unusual case, and the cause of the difficulty has arisen from the act of the tenant himself.

I am of opinion that the rule should be made absolute for a new trial, costs to abide the event.

Rule absolute, *Hagarty, J.*, dissenting.

## EDGAR V. NEWELL.

### *Slander—Evidence of character—Justification—New trial.*

In an action for Slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification, *Held*, that evidence of the plaintiff's general bad character for honesty was properly rejected.

*Seem*, per *Hagarty, J.* that it would have been inadmissible even without the justification; but that, if not guilty only be pleaded, defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged.

The evidence in support of one of the pleas of justification was very strong, sufficient to have warranted a conviction, if the plaintiff had been on his trial. The charge however was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and \$150 damages, the court refused to interfere.

SLANDER, the words charged being "Edgar is a thief, and I can prove it." *Pleas*, 1. Not guilty. 2 and 3, Justification. The second plea alleged that the plaintiff before the said time when, &c., to wit on, &c., feloniously did steal, take, and carry away certain goods and chattels, to wit, one over-coat, two horse-blankets, and one bag containing empty bags, of one William Snider. The third plea charged

the plaintiff with stealing a barrel of salt of one J. P. O'Higgins.

The case was tried at Stratford, before *Draper*, C. J. The words were proved, and defendant gave very strong evidence to shew that the theft charged in the second plea had been committed by the plaintiff about three years previously. He attempted to make out the charge alleged in the third plea as well, but the proof offered was insufficient, and was not pressed before the jury. He also tendered evidence that the plaintiff's character for honesty and his general reputation in that respect was bad, which the learned Chief Justice rejected, on the ground that there was a plea of justification on the record.

The jury found for the plaintiff, \$150 damages.

*Christopher Robinson*, Q.C., obtained a rule *nisi* for a new trial, on the ground that the justification pleaded in the second plea was clearly proved; or on the ground that the learned Chief Justice improperly rejected evidence tendered by the defendant of the plaintiff's general reputation for dishonesty, and bad character as regards that particular trait or quality.

*Robert Smith* shewed cause. He contended that the plaintiff having been in effect placed upon his trial on a charge of felony, it would be contrary to the established practice in such cases to interfere with the finding of the jury in his favour, even though it might seem to be against the weight of evidence—*Symons v. Blake*, 2 C. M. & R. 416: that the defendant having failed to prove his second plea of justification, the verdict on that issue was clearly right, and a new trial, which would disturb it, should not be granted—*Baxter v. Nurse*, 6 M. & G. 935: that the jury might have been properly influenced in their view of the whole case by the fact of such plea having been pleaded without sufficient ground; and that the evidence as to character was properly rejected—*Jones v. Stevens*, 11 Price 235; *Thompson v. Nye*, 16 Q. B. 175.

*Robinson*, Q.C., in support of the rule, cited, as to the motion for new trial on the evidence, *Mellin v. Taylor*, 3



Bing. N. C. 109; *Regina v. Johnson*, 1 L. T. N. S. 513, Q. B.; *Peters v. Wallace*, 5 C. P. 238; *Swan v. Clelland*, 13 U. C. R. 335: As to the admissibility of the evidence of character, *Richards v. Richards*, 2 Moo. & Rob. 557; *Knobell v. Fuller*, Pea. Add. Cas. 139; *Earl of Leicester v. Walter*, 2 Camp. 251; *Inman v. Foster*, 8 Wend. 602; *Bell v. Parke*, 11 Ir. C. L. Rep. 424; ——— v. Moor, 1 M. & S. 284; *Bennett v. Hyde*, 6 Conn. 24; *Bracegirdle v. Bailey*, 1 F. & F. 536; *Myers v. Currie*, 22 U. C. R. 470; *Jones v. Stevens*, 11 Price, 235; *Foot v. Tracy*, 1 Johns 46; *Wyatt v. Gore*, Holt N. P. C. 299; *Newsam v. Carr*, 2 Stark, N. P. C. 70; *Douglass v. Tousey*, 2 Wend. 352; *Wolcott v. Hall*, 6 Mass. 514; *Ross v. Lapham*, 14 Mass. 275; *Sawyer v. Eifert*, 2 Nott & McCord 511; *Root v. King*, 7 Cowen 613; *Taylor on Evidence*, 4th Ed., 355-6; *Rosc. N. P.* 576; *Add. on Torts* 730. As to the effect of a justification being pleaded, *Starkie Ev.*, 3rd Ed., vol. ii, 306 note *k*, 641-2; *Cornwall v. Richardson*, R. & M. 305; *Snowden v. Smith*, 1 M. & S. 286, note *a*; *Root v. King*, 7 Cowen, 613.

HAGARTY, J., delivered the judgment of the court.

As to the merits. This is one of the many cases in which the court is asked to set aside a verdict of which it cannot approve on a calm consideration of the evidence. The testimony certainly was very strong. It would have sufficed most likely to convict the plaintiff, had he ever been put upon his trial for the offence; and had any right, estate or franchise, or large sum of money been at stake, we think it would be only right to submit the case to another jury. But we hardly see our way to interfere in a case like the present. The charge was made long after the alleged offence had been committed. No person had thought proper to prosecute the plaintiff for it, and the defendant, having no especial interest in the matter, charges the plaintiff generally with being a thief. He does this at his peril, and when sued for damages tries to prove the charge, and fails to convince the jury.

| It does not follow, because a man has once committed an

offence, that a jury will always regard with favour a person who persists in casting it up against him at any period, however remote. A person may make the charge relying on his being able to prove it to the satisfaction of a jury. We think he must always run this risk. But we do not think a court is bound to set aside, as a matter of right, a verdict rendered against the weight of evidence, but may leave the defendant to the consequences of his own rashness. It is not usual to put a plaintiff, deliberately charged with fraud or felony in a civil action, twice, as it were, upon his trial; at all events, an action for slander is not one in which the ordinary wholesome rule should be set aside.

We think we cannot properly interfere on the merits.

The rejection of the evidence tendered as to character opens a wide field for discussion.

1st. Should it be permitted under any circumstances?

2nd. If admissible in mitigation of damages, can it be received after evidence offered in bar on a plea of justification?

It seems to me that the doubt suggested as to this evidence, is felt more by the text writers than the judges.

Mr. Taylor, in his last edition, page 355, after giving the different views, says, "Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favour of the admissibility of the evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea."

He cites a great number of cases. I have examined them. The American authorities certainly support his view. I doubt if the English cases go so far. Most of the cases are *nisi prius* decisions. I am not aware of any express decision of the court in Bank except *Jones v. Stevens* (11 Price 235,) which is directly against its reception.

In *Thompson v. Nye*, (16 Q. B. 175,) the question rejected was whether the witness had not heard from other persons that the plaintiff was addicted to certain practices, the subject of the slander. The court refused to decide the general point, but held the question rightly rejected, as it should have been confined to rumours existing before the utterance

of the slander. *Patteson* and *Wightman*, J. J., say they give no opinion on the general question. *Coleridge*, J., says, "I will only go so far as to say, that I do not wish it to be supposed that I am in favor of allowing the question to be put even in its most limited form. My present impression is against doing so." *Erle*, J., says, "It is not necessary to give any opinion as to the admissibility of the question in a qualified form. Many learned judges have admitted it, but they all acted on a decision at *Nisi Prius*, Earl of Leicester v. Walter, which it was not worth the plaintiff's while to question. But in *Jones v. Stevens* the point was brought before the full Court of Exchequer; and there the question was held inadmissible in its general form."

No doubt, *Earl of Leicester v. Walter*, (2 Camp. 251,) is the chief authority. It was a decision of Sir *James Mansfield*, and as the plaintiff had a verdict he did not, of course, move. In deciding to admit the evidence, Sir *James* says: "In point of reasoning, I never could answer to my own satisfaction the arguments urged by my brother *Best*." (the objecting counsel,) "At the same time, as it seems to have been decided in several cases, that if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always possessed a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted."

In a case in Ireland, in 1860, *Bell v. Parke* (11 Ir. C. L. Rep. 426,) *Pigot*, C. B., is decidedly of opinion, "that the great preponderance of authority is in favor of the reception of the evidence." He cites the passage from *Starkie on Slander*, (vol. ii., page 88,) relied on by Mr. Robinson in his very able and exhaustive argument on the authorities. *Fitzgerald*, B., treats it as an unsettled question, *Hughes*,



B. concurring with him. In the last edition of Starkie on Evidence, the point is not touched upon.

In *Bracegirdle v. Bailey*, (1 F. & F. 536,)—in slander, and not guilty alone pleaded—*Byles*, J., after consulting *Willes*, J., held, “that no evidence of bad character, or questions relating to the plaintiff’s previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either on cross-examination or examination in chief, and that he could not ask any thing to prove the libel true.”

In this court, in *Myers v. Currie*, (22 U. C. R. 470), (slander imputing theft), a motion was made for a new trial, because *Richards*, C. J., rejected evidence of the plaintiff’s general bad character previous to the speaking of the words. After consulting the judges of the Common Pleas, the judges of this court refused a rule, for the reasons given in the report.

In this state of the law we think we should discharge the rule for rejection of evidence, and leave the defendant, if he think proper, to endeavour to have the law finally settled by a court of error.

If it be necessary to decide the point, I should say that I think the fact of defendant pleading specifically the truth of his words and endeavouring to prove them, as a matter of reason if not of clear authority, should operate to the exclusion of evidence of rumours or of general bad character.

Where a defendant pleads only not guilty, and endeavours to shew that he was not actuated by any malice or actual desire to injure defendant, he stands, in my judgment, in a very different position from one who deliberately places a justification on the record. This at once takes away from his conduct that palliation which he can naturally urge on not guilty.

I am inclined to hold, notwithstanding the doubts expressed in *Thompson v. Nye*, that with only not guilty pleaded, a defendant might be allowed to shew, solely in mitigation of damages and to rebut the presumption of malice, that prior to his utterance of a specific charge, it was a common talk or rumour in the neighbourhood that the plaintiff had been generally spoken of as having done the thing charged.

This would tend to shew that defendant may have acted not from malice, but rather from heedlessness. If, on the other hand, he put a justification on record, he deliberately charges the plaintiff with the crime as a fact, and I think he should not be permitted to resort to what could only be a palliation and indication of the absence of malice. The justification suggests a wholly different idea of defendant's conduct, and is always held to aggravate it.

General evidence of the plaintiff's bad character for honesty, &c., seems to me to open a far wider field of enquiry, and should not, I think, be received with or without a justification pleaded. A plaintiff, as has been often said, cannot be expected to be prepared to vindicate every act of his life. The existence of a common fame and rumours that he had done a particular act is a fact, not a mere opinion, and when shewn to be current prior to defendant's utterance of the slander, and wholly unconnected therewith, might, I think, be receivable strictly in mitigation of damages.

The state of the authorities on both points is most unsatisfactory.

We think the rule for a new trial should be discharged.

Rule discharged.

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## WIDDER v. THE BUFFALO AND LAKE HURON RAILWAY CO.

*Arbitration under "The Railway Act," C. S. C. ch. 66—Lands injuriously affected—Withdrawal of arbitrator—Notice of desistment—Equitable plea of fraud—Never indebted—Plea, identity of cause of action in different counts.*

In an action on an award, under "*The Railway Act*," of compensation to the plaintiff for damages to his lands injuriously affected by the construction of the defendants' railway, the defendants pleaded that the award was made by two of the arbitrators after the other (the arbitrator appointed by them) had refused to act in and had withdrawn from the arbitration; to which the plaintiff replied that the arbitrator withdrew at defendants' request, after all the evidence on either side had been heard, whereupon the other two proceeded to consider the case and award, having first duly notified him of their intention so to do. *Held*, on demurrer to the replication, that sec. 11, sub-sec. 15 of "*The Railway Act*" clearly did not apply to such a refusal and withdrawal, and that under sub-sec. 11 the two arbitrators had power to proceed as they did.

*Held*, also, on demurrer to a plea of desistment under sub-sec. 16, and to the replication and rejoinder thereto, 1. That the power to desist extends to a case of lands injuriously affected as well as lands taken: 2. That with the notice of desistment a new notice should be given, and without it the old notice remains in force to uphold an award duly made under it.

Defendant also pleaded, *on equitable grounds*, that the sum awarded was excessively and fraudulently exorbitant, and the award was made by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators making it. *Held*, on demurrer, a good defence.

The second count averred that the defendants, by their notice of arbitration, alleged that the plaintiff was entitled to no compensation; and that the arbitrators awarded him \$10,000; whereby, and by force of the statute, defendants became liable to pay him the costs of the arbitration, but did not pay. *Held*, on the authority of *Welland Railway Co. v. Blake*, 6 H. & N. 410, that never indebted was a good plea to this count.

The eleventh plea to the third count, (a common count for money awarded), was that the award mentioned and the money claimed there and in the first count, (a special count on the award), were the same. *Held*, no defence.

ACTION on an award made under "*The Railway Act*," Consol. Stats. C., ch. 66.

DECLARATION.—*First count*.—For that the plaintiff and the defendants entered into an arbitration to ascertain and determine, in manner provided by "*The Railway Act*," the amount of compensation to be paid to the plaintiff for damages to certain land owned and occupied by the plaintiff, situate in the town of Goderich, in the County of Huron, one of the United Counties of Huron and Bruce, and injuriously affected by the construction of the defendants' railway. And the plaintiff avers that one Thomas N. Molesworth was appointed by the said defendants as arbitrator on their behalf, to carry out the said arbitration, pursuant to



the provisions of "*The Railway Act*" aforesaid; and that the plaintiff appointed one Peter Alexander McDougall as arbitrator on his behalf, to act in conjunction with the said Thomas N. Molesworth, for the purposes aforesaid. And the plaintiff avers that the said Thomas N. Molesworth and Peter Alexander McDougall, arbitrators so appointed as aforesaid, could not agree upon a third arbitrator, whereupon Robert Cooper, then being judge of the County Court of the said United Counties of Huron and Bruce, on the application of the said plaintiff, (previous notice of one clear day having been given to the said defendants), did duly and in pursuance of the said statute appoint one Albert Prince to be the third arbitrator, and did, at the same time when he made the said appointment, fix the first day of August, 1864, as the day on or before which the award should be made. And the plaintiff further avers that the said arbitrators were duly sworn before one of her Majesty's justices of the peace in and for the said United Counties of Huron and Bruce, and took upon themselves the burthen of the said arbitration. And the plaintiff further avers that the said Peter Alexander McDougall and Albert Prince, being a majority of the said arbitrators so appointed as aforesaid, afterwards, to wit, on the 29th of June, 1864, duly and in accordance with the provisions of "*The Railway Act*" aforesaid, made and published their award in writing, and did thereby award and determine of and concerning the said matters referred, that the defendants should pay to the said plaintiff, as compensation for so injuriously affecting his said land, the sum of \$10,000. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to be paid the said sum of \$10,000, yet the defendants have not paid the same to the plaintiff.

*Second count.*—And also for that, in and by their notice served on the plaintiff in pursuance of "*The Railway Act*," and appointing the said Thomas N. Molesworth as arbitrator on their behalf, as in the first count mentioned, the said defendants did assert that the said plaintiff was entitled to no compensation for injuriously affecting his land, as in the said count mentioned; and the arbitrators duly appointed to

determine the amount of such compensation, as in that count set forth, did afterwards, as in the said count alleged, award the sum of \$10,000 to be paid to the plaintiff by the defendants, as compensation for their so injuriously affecting his land, being a sum greater than that offered by the said defendants in their said notice, whereby, and by force of the said statute, the defendants became liable to pay to the plaintiff the costs of the said arbitration.. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action, and to recover the said costs from the defendants, yet the defendants have not paid the said costs to the plaintiff.

*Third count.*—And for money payable by the defendants to the plaintiff, for money awarded by Peter Alexander McDougall and Albert Prince to be paid by the defendants to the plaintiff, by an award of the said Peter Alexander McDougall and Albert Prince, under a reference made under the provisions of "*The Railway Act*," to them and one Thomas N. Molesworth, of matters in difference between the plaintiff and the defendants.

*Fourth count.*—And for money payable by the defendants to the plaintiff for costs due by the defendants to the plaintiff, of a reference and award in respect of matters between the plaintiff and the defendants, referred to the arbitration of Peter Alexander McDougall, Thomas N. Molesworth, and Albert Prince, under the provisions of "*The Railway Act*."

*Sixth plea*, to the first count, that the said supposed award was made by the said Peter Alexander McDougall and Albert Prince after the said Thomas N. Molesworth had refused to act in and had withdrawn from the said arbitration, and after the said Peter Alexander McDougall and Albert Prince had full notice of such refusal to act in and withdrawal from the said arbitration by the said Thomas N. Molesworth, and in his absence, contrary to the statute in that behalf.

*Seventh plea*, to the first count, that after the appointment of the said Thomas N. Molesworth, Peter Alexander McDougall and Albert Prince, as arbitrators, in manner, under the statute, and for the purpose in the

first count mentioned, and after they had entered upon the said arbitration and taken upon themselves the burthen of the said reference, but before the making of the said supposed award, they, the defendants, desisted from the said notice of arbitration in the first count mentioned, in respect of the lands of the plaintiff and other the matters and premises in question in the said arbitration, pursuant to the statute in that behalf, of all which the said arbitrators and the said plaintiff had due notice. And the defendants further say, that the said supposed award was made after the said defendants had as aforesaid desisted from the said notice and arbitration, and after due notice thereof, and after the said Thomas N. Molesworth had, in compliance with the said notice of desistment, refused to act in and had withdrawn from the said arbitration.

*Eighth plea*, to the first count, upon equitable grounds, that the sum awarded in and by the said supposed award in the first count mentioned, to be paid to the plaintiff by the defendants as compensation for the injuriously affecting the plaintiff's land by the construction of the defendants' railroad, is excessively and fraudulently exorbitant; and the said supposed award was made by the fraud, covin, and misrepresentation of the said plaintiff and the arbitrators making the same.

*Ninth plea*, to the second count, that the defendants never were indebted as alleged.

*Eleventh plea*, to the third count, that the said supposed award and reference therein mentioned are the same identical award and arbitration in the first count mentioned, and the money claimed under the said supposed award in the third count mentioned, and alleged causes of action in respect thereof, are one and the same as in the first count mentioned.

*Replication to the sixth plea*,—that after all the evidence and arguments offered at such arbitration on the part of the plaintiff or the defendants had been received and duly heard by the said Peter Alexander McDougall, Albert Prince, and Thomas N. Molesworth, the said Thomas N. Molesworth, at the request and acting under the advice of the said defen-



dants, refused to act further in the said arbitration and withdrew therefrom; whereupon the said Peter Alexander McDougall and Albert Prince, at the same meeting of the arbitrators, being a meeting held at a time and place of which the said Thomas N. Molesworth had one clear day's notice, proceeded to consider the said evidence and arguments, and to make the said award, as in the first count is alleged, in the absence of the said Thomas N. Molesworth, having first duly notified the said Thomas N. Molesworth, before he had left the said meeting, of their intention to do so.

*Replication to the seventh plea*,—that the said defendants desisted, as in the said seventh plea alleged, after all the evidence and arguments offered either by the said plaintiff or defendants had been received and heard by the said three arbitrators; and that no new notice was given with regard to the same land mentioned or referred to in the notice of arbitration in the said first count and said seventh plea mentioned, or other land. And the plaintiff further says, that such notice was given for the purpose only of avoiding altogether or delaying the said arbitration, and not for the purpose of correcting by a new notice any mistake or error on the part of the said defendants in the said notice of arbitration or otherwise, in accordance with the statute in that behalf. And the plaintiff further says, that the defendants' said Railway still remains in all respects as at the time when the said notice of arbitration was given by them, and still continues to injuriously affect the said lands of the plaintiff as it then did; and that no notice of any intention on their part to remove or alter the said Railway, so as to prevent or diminish the injurious effect thereof as regards the plaintiff's said land, has been given to the plaintiff by the defendants. And the plaintiff says, that the said Thomas N. Molesworth, after the giving of the said notice of desistment as hereinbefore mentioned, and at the request of the defendants, refused to act further in and withdrew from the said arbitration, whereupon the said Peter Alexander McDougall and Albert Prince, at the same meeting of the arbitrators at which the said notice of desistment was given,

being a meeting held at a time and place of which the said Thomas N. Molesworth had one clear day's notice, and at which the said Thomas N. Molesworth was present up to the time of the said withdrawal, proceeded to consider the said evidence and arguments, and to make the said award, as in the first count of the declaration is alleged, in the absence of the said Thomas N. Molesworth, having first duly notified the said Thomas N. Molesworth, before he had left the said meeting, of their intention so to do.

*The plaintiff also demurred to the 7th, 8th, 9th and 11th pleas, on the following grounds:—*

*As to the seventh plea,*—that the power to desist is given by the statute only when the notice desisted from relates to land taken, and not to land injuriously affected :

That it is not alleged that any new notice was given, with regard to the land mentioned in the said notice, or other land, to the plaintiff or any other party :

That it is not alleged that the defendants desisted from such notice before the arbitrators entered upon the arbitration, or before all the evidence at such arbitration had been received, or at what stage of the proceedings.

*As to the eighth plea,*—that the said plea shews no defence to this action : that fraud cannot be inferred from the amount awarded, nor can the reasonableness or propriety of such award be enquired into in this suit ; and that fraud, either of the plaintiff or the arbitrators, is no answer to an action at law on an award.

*As to the ninth plea,*—that the second count, to which the said plea is pleaded, is not an *indebitatus* but a special count, and the plea offers no answer thereto ; that the said plea neither traverses nor confesses and avoids any allegation in the said count.

*As to the eleventh plea,*—that the said plea offers no answer to the third count of the declaration : that it neither traverses nor confesses and avoids the allegations in said count ; and that the causes of action set out in said third count are on the face of it not identical with those set out in said first count.

*The defendants demurred to the replication to the sixth plea, on the grounds that the said replication does not traverse*

any material fact alleged in the sixth plea, nor does it set forth new matter which in form or in substance confesses and avoids the plea, or any material allegation which in law displaces the defence raised by the plea, or upon which the defendants can take issue; or, if issue were taken, the determination thereof in the affirmative or negative would still leave undetermined the defence raised by the plea.

*Rejoinder to the replication to the seventh plea.*—That after the said three arbitrators had taken upon themselves the said reference, and the plaintiffs had produced before the said three arbitrators, and the said three arbitrators had received and heard all the evidence on behalf of the plaintiff, and the plaintiff had rested his case, the defendants desisted from the said arbitration, as in the said seventh plea alleged; and the defendants and the said Thomas N. Molesworth thereupon, and in compliance with the said notice of desistment, refused to act any further in and withdrew from the said arbitration. And the defendants further say, that they did not at any time offer before the said arbitrators, or any of them, nor did the said arbitrators, or any of them, receive or hear any evidence on behalf of the defendants, nor did the defendants offer any arguments before the said arbitrators, or any of them, in respect of the said reference, the said evidence given and received thereunder, or otherwise, at any time after the plaintiff had so given his said evidence as aforesaid; nor did they offer any arguments before the said arbitrators, or any of them, in respect of the said reference or the proceedings therein, before the said desistment from, refusal to act further in and withdrawal from the said arbitration, except that during and whilst the said evidence on behalf of the plaintiff was being given and received before and by the said three arbitrators, objections were made by the defendants to, and arguments and discussions had upon, the admissibility of certain evidence offered by the plaintiff and received by a majority of the said arbitrators. And the defendants further say, that they so desisted from the said notice of arbitration, with the intention of altogether removing, or so altering the said railway and works as to do away with any ground or cause of arbitration,



or of giving a new notice with regard to the same or other lands to the same or some other party, as it was lawful for them to do for the cause aforesaid. But the defendants say that the plaintiff and the said Peter Alexander McDougall and Albert Prince refused to desist from the said notice and arbitration, although duly notified by the defendants so to do; and although the defendants and the said Thomas N. Molesworth had so desisted from, refused to act further in, and had withdrawn from the said arbitration as aforesaid, yet the said Peter Alexander McDougall and Albert Prince, by themselves, proceeded with the said reference, and made the award in the first count mentioned; and thereupon the plaintiff insisted and still does insist that the defendants were and are bound by the said reference and award. And the defendants further say, that true it is that the defendants have given no new notice with regard to the same lands mentioned or referred to in the said notice of arbitration, in the said first count and said seventh plea mentioned, or other lands; and true it is that the defendants' said railway still remains in all respects as at the time when the said notice was given by them, and still continues injuriously to affect the said lands of the plaintiff as it then did; and true it is that no notice of any intention on the part of the defendants to remove or alter the said railway, so as to prevent or diminish the injurious effect thereof as regards the plaintiff's said lands has been given to the plaintiff by the defendants, because the defendants say that the plaintiff neglected and refused to desist from the said arbitration, but, on the contrary, proceeded therewith, and concluded the same as aforesaid, and from thence hitherto has insisted upon it, and still does insist upon it, that the defendants had no right to desist therefrom, and that they were and are bound by the same award, and therefore could not give any new notice with regard to the same or other lands, to the plaintiff or any other party. And the defendants further say, that they have always been ready and willing, and are now ready and willing, and hereby offer, either to remove or so alter the said railway and works as to take away all cause or ground for arbitration with respect to the plaintiff's lands, or to give a new notice of arbitration

with regard to the same or other lands, pursuant to the statute in that behalf, so soon as the plaintiff shall have complied with and acted upon the said notice of desistment so given as aforesaid, by abandoning his said alleged award, and his claim thereunder, or so soon as it shall be determined, in this action or otherwise, that the said award is not final and conclusive and binding on the defendants. And the defendants further say, that the plaintiff has not given to the defendants any notice of his intention to comply with the said notice of desistment, or any notice of his intention not to insist upon the performance of the said award by the defendants; but, on the contrary, has always insisted, and now does insist, that the whole subject matter of the said arbitration was and is concluded by the said award, and that the said award has always been and now is binding on the defendants.

*The defendants also demurred to the replication to the seventh plea*, on the following grounds:—1. The same grounds as stated in respect of the replication to the sixth plea. 2. The replication offers six distinct answers to the seventh plea, some of which may be true and some untrue, thus rendering it impossible for the defendants to take issue on it, for in the event of any one of the answers set up being true the issue would be found for the plaintiff. 3. The replication is double. 4. It is a departure from the first count and seventh pleas. 5. The first, second, third, fourth, and fifth answers in the said replication, profess to be in confession and avoidance, and are offered to excuse the plaintiff from being bound by the allegations in the seventh plea; and the sixth and last answer in the said replication shews that the facts previously stated, and of which the plaintiff complains, were caused by the act of the plaintiff in not desisting from the said arbitration, and by his own wrongful act in proceeding therewith, and in making his award, and in insisting upon its being binding on the defendants. 6. No certain material issue can be taken on the said replication. 7. It necessarily raises numerous side issues, without affecting the question raised by the seventh plea.

*The plaintiff demurred to the rejoinder to the replication*

to the seventh plea, on the ground that it neither traverses nor confesses and avoids any averment in the said replication, and that the matters therein contained, if true, afford no answer to such replication.

*Galt*, Q. C., and *C. Robinson*, Q. C., for the plaintiff, cited, as to the sixth plea, *Russell on Awards*, 3rd Ed., 206-210; *Dalling v. Matchett*, Willes 215; *In re Young and Bulman*, 13 C. B. 627; *Hawley and The North Staffordshire R. W. Co.*, 2 DeG. & Sm. 33, 45; *Goodman v. Sayers*, 2 Jac. & W. 261-2:—As to the seventh plea, *Grimshawe v. The Grand Trunk Railway Co.*, 15 U. C. R. 224:—As to the eighth plea, *Russell on Awards*, 3rd Ed., 505, 530, 541; *Wills v. McCarmick*, 2 Wils. 148; *Heming v. Swinerton*, 1 Coop. C. C., Temp. Cottenham, 420, citing *Dyer v. Dawson*; *Goodman v. Sayers*, 2 Jac. & W. 259; *Russell on Awards*, 686, 458-9, 698; *Whitmore v. Smith*, 7 H. & N. 509:—As to the ninth plea, *Welland R. W. Co. v. Blake*, 30 L. J. Ex. 161.

*M. C. Cameron*, Q. C., contra, cited, as to the seventh plea, *Russell on Awards*, 2nd Ed. 150; *Milne v. Gratrix*, 7 East 607; *Warburton v. Storr*, 4 B. & C. 103; *Aston v. George*, 2 B. & Al. 395; *Green v. Pole*, 6 Bing. 443.

The clauses of the statute referred to are cited in the judgment.

DRAPER, C. J., delivered the judgment of the court.

The first demurrer is to the replication to the sixth plea. The demurrer is rested on the broad ground that the refusal to proceed and withdrawal of the third arbitrator prevented the other two arbitrators from proceeding. The 15th subsection of section 11 of "*The Railway Act*," does certainly provide that if the arbitrator appointed by the County Judge, or an arbitrator appointed by either of the parties, dies before the award has been made, or is disqualified, or *refuses* or *fails to act* within a reasonable time, another may be appointed in his place, though no recommencement or repetition of prior proceedings shall be requisite in any case. We are clearly of opinion that this does not apply to such a refusal



and withdrawal as these pleadings disclose,—*i. e.*, a refusal and withdrawal after hearing the parties and all the evidence adduced. The 11th subsection appears to us to apply to the present state of facts, and to recognize and affirm the power of two of the three arbitrators to make an award under such circumstances as the replication sets out. The point did not come up for judgment in *Grimshawe v. The Grand Trunk Railway Company* (15 U. C. 224) though some observations on it were made *obiter*. In our opinion the plaintiff is entitled to judgment on this demurrer.

The seventh plea, the replication to it, and the rejoinder to that replication, are all demurred to. The defendants rely on the case of *Grimshawe v. The Grand Trunk Railway Company*, which is a binding authority upon us. This decision was founded upon the 16th sub-section of section 11, (a) and the facts were, that the defendants had laid out their line of railway over the plaintiff's land, and had taken possession and made their railway thereon, and they had given the plaintiff notice that they required this land, and offered him £433 15s. as a compensation, naming their arbitrator in case the plaintiff refused to accept that sum. Thereupon the plaintiff also named an arbitrator, and these two named a third. The three arbitrators met, took the requisite oath, and adjourned to a future day, on which day the defendants gave notice of desistment, and at the same time gave a new notice, offering £450 as a compensation, and naming an arbitrator in case the plaintiff declined to accept this last offer. After the delivery of these notices the defendants' arbitrator wholly withdrew from the proceedings on the first reference, but the other two went on and made the award which was sued upon. The court held that this award was void, as the defendants had, on the facts appearing, the right to desist from their first notice, and having done so, the arbitrators' authority was gone.

The differences between that and the present case on

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(a) The words of that sub-section are, "Any such notice for lands, as aforesaid, may be desisted from, and new notice given, with regard to the same or other lands, to the same or any other party, but in any such case, the liability to the party first notified for all damages or costs by him incurred in consequence of such first notice and desistment, shall subsist."

which the plaintiff principally relies, are, 1st, that the power to desist relates only to land taken, and not to land injuriously affected; 2nd, that no new notice whatever was given, and that the desistment was not announced before all the evidence which was offered had been received, and that it was not stated at what period of the proceedings the desistment took place.

We think the power to desist extends to all notices which are to be given under the 7th sub-section of section 11, whether lands are intended to be taken or powers to be exercised by which damages to the owners of lands are caused. The same or similar reasons which may be supposed to have induced the legislature to permit the Railway Company to desist in the one case, would probably be applicable in the other. We see nothing sufficiently certain in the language used, "notice for lands," to limit the power to lands which are taken.

The second difference, namely, that no new notice was given, raises the more difficult question, whether the statute does not make the giving a new notice indispensable to the valid exercise of the power of desisting from the previous notice. The right to compensation, to all parties whose lands are taken or injuriously affected, is distinctly recognized or asserted in an early part of the statute. Where lands are taken, the rule seems to be that payment shall precede the entry by the Company, though provision is made for their taking possession before payment upon certain conditions. When the compensation is for damages consequential to the construction of the railway or to the exercise of powers conferred on the Company, a previous ascertaining of the amount of compensation may not always be possible, though the language of the 20th sub-section of section 11 may be wide enough to include such cases. But with regard to desisting, no distinction appears to be drawn or intended; whatever is directed as to lands taken must equally apply to lands injuriously affected, if this sub-section applies, as we think it does, to all notices for lands. Now we cannot bring ourselves to hold, that while the legislature prescribed that a notice should precede the ascertainment of the compensation, and the payment of compensation should precede the right to take

possession, (except in cases already adverted to), they at the same time intended, by giving the right to desist, to enable the Company to postpone indefinitely the ascertaining the amount of compensation. The right of desisting appears to us to have been advisedly connected with the giving a new notice, that the latter should be substituted for the former, and therefore that they should be cotemporaneous acts.

In the case referred to, a new notice was served at the same time as the notice of desisting, notwithstanding which two of the arbitrators proceeded to make an award. Proceedings were afterwards taken under the new notice, and a sole arbitrator was appointed by the Judge of the County Court, who made an award also. The court held the first award void, in an action brought by the plaintiff to enforce it. In the present case there has been no new notice, and in the rejoinder to this replication the defendants admit the absence of such new notice and the continuance of the injury to the plaintiff's and, but say it is the plaintiff's fault, because he asserts that the award made is good, and will not abandon it. Thus, in effect, the defendants set up that they have, by desisting from their notice, destroyed the first submission, but are under no necessity to enter into another until the plaintiff recognizes the validity of their act, and the consequent invalidity of the award on which he founds this action.

We rest our conclusion in favour of the plaintiff as to this objection on the ground that the defendants have done him a legalized injury, and are bound to do what the act requires to ascertain the amount of his compensation. They were bound to give the first notice; having done so, they were bound to proceed under it, unless they desisted in the manner the statute points out, which is, in my humble judgment, giving a new notice in lieu of that which they intend to abandon. Till the new notice is given, we think there can be no complete and final desisting from the old, and till such complete desisting the old notice is in force to uphold proceedings taken under it, and in accordance with the statute, This construction of the act works no hardship or injustice on Railway Companies, while the contrary may produce both to land owners. We think, therefore, the plaintiff is entitled



to Judgment on the seventh plea and the subsequent pleadings relative thereto.

The eighth plea charges that the sum awarded is fraudulently exorbitant. It is a plea of fraud on the part of the plaintiff and the arbitrators, and is pleaded upon equitable grounds. We think the defendants entitled to judgment on the demurrer to this plea. At law such a plea is not maintainable, but if in a bill in equity fraud and corruption were charged and proved on the part of the arbitrators, the court would, we apprehend, set aside the award or grant a perpetual injunction against enforcing it at law; and if so, this plea must be a good defence to the action.

We think the defendants' ninth plea (never indebted) sustained by the decision in *Welland Railway Company v. Blake* (6 H. & N. 410.)

We are of opinion the 11th plea is not sustainable. If it be true, the count to which it is pleaded was introduced contrary to a rule of court, being a second count upon a cause of action already declared upon. The defendants should have moved to strike it out.

Judgment for plaintiff on demurrer to the replication to the sixth plea, and to the seventh plea and the subsequent pleadings relative thereto, and to the 'eleventh' plea; and for defendants on demurrer to the eighth and ninth pleas.

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CAMPBELL v. PATRICK DELIHANTY AND WILLIAM DELIHANTY, JOHN TOOMY AND MARGARET HIS WIFE.

*Alias Fi. Fa. lands—When sale may take place under.*

*Held*, conforming to previous decisions in this court—Nickall v. Crawford, Tay. Rep. 376, and Ruttan v. Levisconte, 16 U. C. R. 500—that where a *Fi. Fa.* against lands had been in the Sheriff's hands for twelve months, and returned, nothing having been done upon it, the Sheriff might sell under an alias writ issued thereon without waiting for a year from its receipt.

EJECTMENT for the east half of the east half of lot one, in the second concession of Chatham. Defence by Patrick Delihanty for the whole.

The claimant gave notice of title under a sheriff's deed from John Mercer, Esquire, sheriff of the county of Kent, to the plaintiff, of all the interest of Patrick Delihanty in the premises. The defendant claimed title as yearly tenant of John Toomy and Margaret Toomy, who were grantees of William Delihanty of the same.

The case was tried at Chatham, in October, 1864, before *Hagarty, J.*

The plaintiff put in an exemplification of a judgment recovered in the County Court of York and Peel, in a cause of John Cameron against Patrick Delihanty, entered on the 16th of March, 1857, upon promises, for £51 7s. 10d. damages, and £3 0s. 7d. costs; also of a *Fi. Fa.* against goods in the same cause, issued on the 7th of September, 1860, returned £25 made, and *nulla bona* for the residue; also of a *Fi. Fa.* for the residue against lands, tested 13th February, 1861.

He also put in an *Alias Fi. Fa.* for the residue against lands and tenements, tested 15th February, 1862, and received by the sheriff on the 20th of the same month. All these writs of execution were directed to the sheriff of Kent.

It was admitted that a patent granting this land was issued in 1828: that the foregoing judgment was duly recovered, and a certificate thereof was registered on the 26th of March, 1857, and was re-registered.

By deed dated 5th July, 1862, John Mercer, Esquire, sheriff of Kent, (under the said *Alias Fi. Fa.* for residue)

in consideration of \$198.96 paid by the plaintiff, conveyed to him the premises in question, and all the estate, right, title and interest which the now defendant Patrick Delihanty had therein on the 20th of February, 1860—*habendum*, to the plaintiff in fee.

The sheriff proved the execution of this deed: that he received the first execution against lands on the 15th of February, 1861, and the second on the 20th of February, 1862. He returned the first of these writs, nothing having been done upon it, and advertised the lands immediately on the receipt of the second writ, and sold on the 5th of July, 1862.

On the defence, it was objected that the writ on which the lands were sold was not a year in the sheriff's hands, and on this objection the plaintiff was non-suited, with leave to move to enter a verdict for him if he was entitled to recover.

In Michaelmas Term *Hector Cameron* obtained a rule on the leave reserved, citing *Nickall v. Crawford*, Tay. Rep. 376; *Ruttan v. Levisconte*, 16 U. C. R. 495.

In this term *Douglas* shewed cause. He relied on the statute 43 Geo. III., ch. 1, re-enacted in the Consol. Stat. of U. C., ch. 22, sec. 252, "nor shall the sheriff expose the lands to sale within less than twelve months from the day on which the writ is delivered to him."

DRAPER, C. J., delivered the judgment of the court.

If the question were *res integra*, we should have probably hesitated a good deal before we arrived at the conclusion that where a writ of *Fi. Fa.* has been placed in the sheriff's hands and remained there for twelve months, during which nothing was done upon it, and then it was returned, "no lands," and an alias writ thereupon issued, that the sheriff could sell lands under the last writ within twelve months from the day on which he received it. But such has, within my own experience, been the practice for upwards of thirty years, and on reference to the Master, to search into similar proceedings in his office, he has traced it for nearly forty years back, and probably it is older. In *Nickall v. Craw-*



ford, (Tay. Rep. 376), it was so adjudged, and that case is referred to as authority by *Burns, J.*, in *Ruttan v. Levisconte* (16 U. C. R., 495.) So many titles would probably be shaken by a contrary decision, that we deem it better to uphold the course so long followed, leaving to a higher authority either to confirm or change it.

Rule absolute.

### IN THE MATTER OF CHARLES FENNELL AND THE CORPORATION OF THE TOWN OF GUELPH.

*By-Law—Powers of Town Council with regard to sale of provisions, &c—Licenses to Butchers—Punishment imposed for breach—Whether it must be fixed in by-law or may be left to the magistrate.*

The corporation of a town by by-law enacted that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon, as therein provided, except all hides and skins from animals slaughtered by the licensed butchers of the corporation holding stalls in the market. *Held*, bad, as being beyond the power of the Corporation.

Also, that meat, fish, poultry, eggs, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit, except wild fruit, should not be exposed for sale within the municipality, except in the market, before 12 o'clock, noon.

*Held*, bad, as to the articles printed in italics, power being given as to the others only, by sec. 294, sub-sec. 10, of Consol. Stats. U. C., ch. 54.

Also, that before 10 A. M. during May, June, July, and August, and before 11 during the other months, no huckster, butcher, dealer, trader, runner, agent, or retailer, or any other person purchasing for export or to sell again, should buy, bargain for, engage or offer to buy any article of household consumption brought to the market, excepting pork, grain, flour, meal, or wool. *Held*, bad, except as to hucksters and runners, they only being included in sub-sec. 12.

Also, that all persons exercising the trade of a butcher within the town should be licensed each year, as provided, the fee for each license to be 5s. *Held*, clearly bad, under secs. 217, and 294, sub-sec. 31.

Also, that any person breaking any of these provisions should, upon conviction before the Mayor or any other Magistrate of the town, forfeit and pay a fine not exceeding \$50, nor less than \$1, and costs, and in default thereof, and of distress out of which to levy, should be committed, with or without hard labour, for not more than 21 days. *Quære*, taking together sec. 243, sub-secs. 6, 7, 8, and secs. 206, 207, 360, 366, whether the statute authorizes a discretion as to the amount of fine and term of imprisonment to be thus given to the magistrate, or whether it must not be fixed by the by-law. There being room for doubt as to this point, and reason to believe that many convictions might have taken place under similar provisions in other by-laws, the court refused to quash upon this objection.

*J. H. Cameron Q. C.*, obtained during last term a rule, calling on the Corporation of the town of Guelph to shew

cause why the 2nd and 4th clauses of their by-law No. 75, the third clause of their by-law No. 80, and the 2nd, 3rd, and 4th clauses of their by-law No. 84, should not be quashed, with costs, on the following grounds:—1. As to the second and fourth clauses of by-law 75, because the corporation has no power to restrain the exposure for sale of the articles in the second clause mentioned in the manner therein stated, nor to exact a market fee thereon, nor to require the licenses in the fourth clause mentioned: 2. As to the third clause of by-law 80, because the corporation has no power to restrain the exposure for sale, or direct the place of sale, of the articles in that clause mentioned, in the manner and subject to the payments therein stated:

3. As to the second and third clauses of by-law 84, because the corporation had no authority to restrict the sale of all the articles therein mentioned, nor to prevent the purchase of any of the articles therein mentioned, by all or any of the persons, in the manner and at the times therein stated:

4. As to the fourth clause of No. 84, because it states neither the exact amount of the fine to be imposed nor the length of imprisonment to be adjudged, nor whether with or without hard labour, for the breach of any of the provisions of the said by-laws mentioned therein; nor does it state in whose discretion the amount of fine, or length or nature of imprisonment is to be.

The second clause of by-law No. 75 was, that no person shall expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables or fruit, (except wild fruit) within the town of Guelph, at any place but the public market, without having first paid the market fee thereon, as hereinafter provided.

The fourth clause of the same by-law was, that all persons exercising the trade of a butcher within the town shall require to be licensed by the Mayor, who is hereby authorized to issue such license under the town seal; all such licenses to be issued for one year, dating from the 1st day of January, and not transferable; and that the charge for such license shall be five shillings currency.

The third clause of by-law No. 80 was, that no person shall expose for sale any hides or skins, within the town of Guelph, at any place but the public market, without having first paid the market fees thereon, according to the manner the same are brought to market, as provided in section 28, by-law No. 75; save and except all hides and skins from animals slaughtered by the licensed butchers of the corporation holding stalls in the market, who shall be exempted from paying market fees on such hides and skins.

The second clause of by-law No. 84 was, that meat, fish, poultry, eggs, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit, except wild fruit, shall not be exposed for sale within the municipality at any other place but in the market, before the hour of twelve of the clock, noon.

The third clause of the same by-law was, that before the hour of ten in the forenoon during the months of May, June, July and August, and before the hour of eleven in the forenoon during the months of January, February, March, April, September, October, November and December, no huckster, butcher, dealer, trader, runner, agent or retailer, or any other person purchasing for export or to sell again, shall buy, bargain for, engage or offer to buy any article of household consumption brought to the market, excepting pork, grain, flour, meal, or wool.

The fourth clause of this by-law was, that any person breaking any of the provisions of this by-law, or of either or of both by-laws numbered 75 and 80, shall, upon conviction thereof before the Mayor, or any other magistrate of the town, forfeit and pay for each offence a fine not exceeding \$50, nor less than \$1, and costs, one-half of which fine shall be paid to the informer, and the other half to the town treasurer for the use of the town, and in default of payment, and there being no distress found out of which such fine and costs can be levied, shall be committed to the common gaol or house of correction, with or without hard labour, for any period not exceeding twenty-one days, unless the said fine and costs be sooner paid.

In this term *Galt* Q. C., opposed the rule.



The following sections of the Municipal Institutions Act were cited:—sec. 294, sub-secs. 6 to 15 inclusive ; sec. 217, sec. 243, sub-sec. 6, sections 205, 206, 207.

DRAPER C. J. delivered the judgment of the court.

The first objection is, that there is no power to restrain the exposure for sale of the articles mentioned, in the second and fourth clauses of by-law No. 75, nor to exact any fee thereon.

The municipality may prevent or regulate the sale by retail in the public streets of meat, vegetables, fruit or beverages.—Sub-sec. 8, of sec. 294.

They may prevent or regulate the sale of articles or animals exposed for sale or marketed in the open air.—Sub-sec. 9.

They may regulate the place and manner of selling and weighing butcher's meat, fish, hay, straw, fodder, wood and lumber.—Sub-sec. 10. This does not however include licensing, as appears from sub-sec. 31, which provides for regulating and licensing owners of livery stables, &c.

They may prevent forestalling, regrating or monopoly of market grains, meats, fish, fruits, roots and vegetables. Sub-sec. 11.

They may prevent and regulate the purchase of such things by hucksters or runners living within the municipality, or within a mile from the outer limits thereof.—Sub-sec. 12.

They may regulate the mode of measuring or weighing lime, shingles, laths, cordwood and coal, and other fuel.—Sub-sec. 13.

They may regulate vehicles, vessels, and other things in which anything is exposed for sale or marketed in any street or public place, and impose a reasonable duty *thereon*.—Sub-sec. 15. (*Quære*, the vehicles, or any thing exposed, &c.)

We think the second section of by-law No. 75, and the third section of by-law No. 80, exceed the powers given by the act. They assume to restrain the sale of the articles enumerated to the market-place, unless a certain fee is paid. It certainly is not warranted by sub-sections 8 or 9. They prohibit the sale within the town of any of the articles mentioned unless a fee be paid, thus in effect levying a tax on

all such sales made within the town, for the words "market fee" import a tax if the sales are within the market. Besides, the power to prevent or regulate sales by retail in the public streets is limited to meat, vegetables, fruit and beverages: the general power to prevent and regulate the sale of articles or animals is limited to those exposed for sale or marketed in the open air; while their power to regulate the *place* and manner of selling is limited to butcher's meat, fish, hay, straw, fodder, wood and lumber. We have held that a corporation may limit the sale of fresh meat to shops and stalls provided in the market place, when reasonable accommodation for such business is furnished—Kelly and the Corporation of Toronto, 23 U. C. R. 425; but this by-law goes farther, and imposes a tax for selling any of the articles mentioned in every shop or house within the town, extending to things not specified in the statute, over the sale of which the law gives them no control, except when the exposure for sale is in the open air, or by retail in the public streets.

For similar reasons, we think the second section of by-law No. 84 not wholly sustainable. It includes articles not mentioned in sub-section 10, as poultry, eggs, cheese, grain, shingles, flour, wool, meal, vegetables and fruit, as to which no power is given to regulate the place of sale; and though the prohibition to sell these things except in the market is limited in point of time, it is not the less unwarranted for the time which the prohibition covers.

In like manner the third section of by-law No. 84 exceeds the power conferred by sub-section 12, which names only hucksters and runners, while this third section mentions butchers, dealer, trader, agent or retailer, or any other person purchasing for export or to sell again, and prohibits buying or bargaining for, or offering to buy, any article of household consumption brought to the market, excepting pork, grain, flour, meal or wool. We do not think we can possibly treat these additional words as mere tautology, and as including no more than the words huckster or runner, and we think this section unwarranted except as to hucksters and runners.

The fourth section of by-law No. 75 was given up by Mr.

Galt, and could not be supported. The 31st sub-section of section 294 of the statute shews that where the legislature intended to give power to license as well as to regulate, they have said so. The 217th section prevents any doubt as to the existence of any such power, unless it were expressly conferred.

The fourth section of by-law No. 84 involves more difficulty, and we are apprehensive that the course adopted in this section of giving a discretionary power to magistrates as to amount of fines, duration of imprisonment, and imposition of hard labour, has been very generally followed, and that convictions not a few may have ensued thereon.

It is only by inference, and not from any direct form of expression, that this discretionary power is conferred upon the magistrates, for the provision is, that any person breaking any provision of these by-laws shall upon conviction forfeit, &c., and in default of payment, and there being no distress found, be committed, &c., with or without hard labour. The statute (section 243, sub-sections 6, 7, 8,) gives to the Municipal Council authority to pass by-laws for inflicting reasonable fines and penalties, not to exceed \$50, for collecting them by distress and sale of the offender's goods, and in case of non-payment, and of there being no distress found, of inflicting imprisonment not to exceed twenty-one days, with or without hard labour. The 206th and 207th sections of the statute evidently contemplate that the fine or penalty, as well as the term of imprisonment, shall be fixed by the by-law, and looking no further than these provisions, they appear to us to indicate that the council should exercise the discretion of determining both one and the other. The maxim "*Delegata potestas non potest delegari*," or, as it otherwise expressed "*Delegatus non potest delegare*," appears to us to apply; and though the municipality might, and we think ought to have declared the rule as to punishment, and the justices alone could inflict it, it cannot be said to be a matter of indifference that both these powers should be exercised by the justices.

On the other hand, it may be well urged that a knowledge of the circumstances of each particular case is essential for



the exercise of discretion both as to fine and as to imprisonment, and that this knowledge could only be obtained by the justice before whom the offender is brought, and that any determination as to amount of fine or length of imprisonment contained in the by-law must necessarily be made in ignorance of particular facts, which would call for the exercise of discretion. Further, it may be said that in the 360th section of the statute, the legislature have actually reposed the discretion in the justices who are called upon to convict, and that the 23rd sub-section of section 360 extends to "every fine and penalty imposed by this act," giving jurisdiction to every justice of the peace for the county, though the 366th section provides that so far as respects offences against any by-law of a town, jurisdiction shall be exercised exclusively by the police magistrate, or mayor, or justice of the peace for the town.

It is very possible that the words "this act" have been inadvertently introduced into the 23rd sub-section of section 360, and that the legislature contemplated at the moment only the enactments relative to pounds and pound-keepers; otherwise we find an apparent inconsistency between this 23rd sub-section and the 6th, 7th, and 8th sub-sections of section 243, as to the length of imprisonment. And it must be borne in mind that in section 243 fines and penalties imposed by by-laws are alone contemplated, and that section 360 introduces the sub-sections by a provision that they shall be in force only until varied by act of parliament, or by by-laws. Nevertheless, as to those sub-sections the 366th section does not confine jurisdiction over offences against their provisions to the police magistrate, or mayor, or justices of the town, for the justices of the county are only prevented from exercising jurisdiction within the town over offences against by-laws.

Taking the statute together, and remembering that the jurisdiction of the justices may be easily brought in question by any party against whom it is exercised, and also that if it be deemed necessary, or even expedient, the legislature can settle doubts by a declaratory act, we do not think this a case for the exercise of our power to quash this provision

of the by-law No. 84. If we did so, our decision might produce retroactive effects upon some who have for several years acted in good faith under its assumed validity.

We anticipate no such difficulty as to the other provisions moved against, or if any to a very limited extent, and they appear to us very clearly to be in excess of the authority of the Municipal Council, a conclusion at which, as regards the fourth clause of by-law No. 84, we have not yet finally arrived.

The rule must therefore be absolute to quash:—1st. The second clause of by-law No. 75:—2nd. The fourth clause of the same by-law:—3rd. The third clause of by-law No. 80:—4th. So much of the second clause of by-law No. 84 as relates to poultry, eggs, cheese, grain, shingles, flour, wool, meal, vegetables and fruit:—5th. So much of the third clause of the same by-law as relates to any persons not being hucksters or runners—with costs;—and to discharge the rest of the rule.

## JOHN GREEN AND ELLEN GREEN HIS WIFE V. WRIGHT.

### *Seduction.*

Declaration by husband and wife for the seduction of the wife's daughter by a former husband, while living with the plaintiffs, whereby she became pregnant (not alleging the birth of a child) and they lost her services. *Held*, bad, following *Smith et ux. v. Crooker*, 23 U. C. R. 84. *Quære*, whether sec. 1 of the Seduction Act, C. S. U. C. ch. 77, applies, except where the female seduced "was at the time of her seduction serving or residing with another person." *Semble*, that sec. 3, postponing the right of the master for six months to that of the father or mother, refers only to the new right of action given to the latter by sec. 1; and if so, *quære*, whether the ground upon which the plaintiff's verdict in *McIntosh v. Tyhurst*, 23 U. C. R. 565, was set aside, can be maintained.

DECLARATION.—For that the said Ellen Green, before her marriage with the plaintiff John Green, was the wife of one John Mitchell, and had by her said former husband a daughter, one Lucinda Mitchell, and the said former husband died, and the plaintiff Ellen Green survived him, and the plaintiff Ellen Green then intermarried with the plaintiff John Green, and the said Lucinda remained and resided in

the house of and with the plaintiffs, in this province, as the daughter of the said Ellen Green and the servant of the plaintiffs; and during such residence the defendant debauched and carnally knew the said Lucinda, whereby she became pregnant and sick with child, and the plaintiffs lost the services of the said Lucinda, and were put to expense in attendance on her.

*Demurrer*, on the grounds, that there is a misjoinder of plaintiffs: that it is uncertain whether it is sought to maintain the action in right of both plaintiffs jointly, or in right of each severally, or if in right of only one which one:—that the plaintiff John Green has no right of action under the statute of this province respecting the action of seduction, and if joined at all as a plaintiff should have been for conformity sake only:—that if it is sought to maintain the action in right of the said John Green as master of Lucinda, the female alleged to have been seduced, then the plaintiff Ellen Green should not be joined as a plaintiff, as in that case the said Lucinda would have been the servant of the plaintiff John Green alone:—that the statutory right of the mother, if any, is inconsistent with the common law right, if any, of the plaintiff John Green, and the action cannot be sustained on both grounds together:—that the declaration does not allege that the female seduced was unmarried, or that six months had elapsed between the birth of the child and the commencement of this suit, and that the mother had not brought action.

*O'Connor* for the demurrer. *Albert Prince* contra.

The authorities cited are referred to in the judgment.

DRAPER, C. J., delivered the judgment of the court.

In *Smith et. ux. v. Crooker*, (23 U. C. R. 84,) the declaration states that the girl seduced had been delivered of a child, while in the present case it is only stated that she became pregnant, which, under the authority of *L'Esperance v. Duchene*, (7 U. C. R. 146,) is sufficient for the maintenance of this action. There is no other material difference between the two declarations, and if the former was bad this must be bad also.



Mr. Prince, however, very properly relied on our late decision in *McIntosh v. Tyhurst*, (23 U. C. R. 565,) where we held that the plaintiff, who brought his action at common law for the seduction of his servant, brought it prematurely, because the girl seduced was the daughter of his wife by a former husband; and that, although she was seduced after the second marriage, the third section of the act gave the wife the exclusive right of action as mother for six months after the birth of her daughter's child, to which the plaintiff's right of action as master was to be postponed; and as the action appeared at the trial to have been brought within the six months we granted a new trial.

There is a consideration which was not urged to us at the argument of that case, which has given rise to some doubt in my mind as to the grounds on which we set aside the verdict. The Seduction Act, Consol. Stat. U. C. ch. 77, sec. 1, conferred a new right of action on the father, and in case of his death on the mother, of an unmarried female, for her seduction—namely, the right to sue notwithstanding such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise. At common law the action is founded solely on the relation of master and servant. Slight proof of service and of loss of service is required, and indeed before, and with us especially since, our statute, loss of service has been generally inferred rather than directly proved, where pregnancy has been shewn to exist, or a child has been born, though the relation of servant and the loss of service must be averred in the declaration.

The third section I think must be held to refer to the action given to the parent by the first, when it allows the master, as distinguished from the father or mother, to bring an action for the seduction, provided (among other things) the father or mother, being resident in Upper Canada, does not bring such action within six months after the birth of the child.

In *McIntosh v. Tyhurst*, the seduction was proved to have occurred in the plaintiff's own house, after the intermarriage between him and the mother of the girl seduced, and hence

a doubt arises whether this was a case properly within the first section, where the female seduced was serving or residing with some person other than her father or mother. For though it is true McIntosh was "another person," and not one of the parents of the girl seduced, and there was evidence to go to the jury that she was serving or residing with him, though he was rarely at home, yet the fact of the mother's marriage to him ought to be held as proof that the girl was in fact residing with her mother, and so the case would not come strictly within the provisions of the statute, and if not, the plaintiff would as master have his ordinary right of action at common law. As we granted a new trial the case may again come before us, and receive further examination.

In the meantime we think we should follow the decision in *Smith et ux. v. Crooker*, and give judgment for the defendant on this demurrer.

Judgment for defendant on demurrer.

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### KINGAN ET AL. V. HALL, SHERIFF.

#### *Escape—Form of action for—Evidence—Damages.*

Plaintiffs declared against the sheriff for an escape, alleging that defendant took one M. under a *Ca. Sa.* upon a judgment recovered by them, and without their consent voluntarily suffered him to escape, whereby they lost the sum indorsed on said writ, and were otherwise injured. Defendant pleaded not guilty, on which the plaintiffs joined issue.

*Held*, that the declaration must be treated as in case, not in debt under the statutes 13 Ed. I., ch. 11, and 1 Rich II ch. 12; and that the damages being therefore open, evidence as to the value of the debtor's custody to the plaintiffs should have been received.

THE DECLARATION set forth that the plaintiffs recovered a judgment against one Morrow, and under an order of a judge sued out a *Ca. Sa.*, on which writ the defendant took Morrow, and had him in custody for the sum recovered and costs; yet defendant, without the plaintiffs' consent, voluntarily suffered Morrow to escape, whereby the plaintiffs lost the said sum and costs, and were otherwise injured.

*Pleas.*—1. Not guilty ; 2nd, 3rd, 4th and 5th pleas, demurred to.

Issue was taken on all the pleas, and the plaintiff replied specially to the 2nd, 3rd, 4th and 5th pleas.

The defendant demurred to the replication to the 3rd plea, and joined issue on the replications to the other pleas.

Judgment was given in the plaintiffs' favour on all the demurrers. (*a*)

The case was tried at Peterborough, in November last, before *Morrison J.*

The plaintiffs produced an exemplification of their judgment against Morrow, and the writ of *Ca. Sa.* with the defendant's return thereon of *Cepi Corpus*, on the 14th of January, 1864. They also proved the escape, by shewing that Morrow was at large within the town of Peterborough, in February and March, 1864, but the witness stated that he understood Morrow was out on bail on the limits. Afterwards, in May, Morrow left the county of Peterborough.

It was objected, that there was no evidence of any escape, but only that he was on bail, and there was no evidence that he was out of the county before this action was brought, (5th March 1864), and that the sheriff was not liable for an escape so long as the debtor had not left the limits, even although the debtor had not given a bail bond. Leave was reserved to the defendant to move to enter a nonsuit on this objection.

The defendant then offered to prove that the custody of Morrow was of no value to the plaintiffs. The learned Judge rejected this evidence, and the plaintiff recovered a verdict for the full amount indorsed on the *Ca. Sa.*, with interest.

In Michaelmas Term, *C. S. Patterson* obtained a rule calling on the plaintiffs to shew cause why a new trial should not be granted, on the ground of the improper rejection of this evidence. He cited *Brown v. Paxton*, 19 U. C. R. 432 ; *Arden v. Goodacre*, 11 C. B. 371, 377 ; *Bonafous v. Walker*, 2 T. R. 126 ; *Hemming v. Hale*, 7 C. B. N. S. 487.

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(*a.*) See the judgment on demurrer, reported 23 U. C. R. 503, where the declaration is more fully stated.



*Hector Cameron* shewed cause, citing C. L. P. A. sec. 9; Bullen & Leake Prec. 28.

DRAPER, C. J.—Mr. Cameron argued that since the Common Law Procedure Act (sec. 9) had rendered it unnecessary to mention any form or cause of action in any writ of summons, or in any notice thereof, in effect the forms of action were superseded, and consequently the defendant might call upon the court to treat the declaration in this action as a declaration in debt, and then the principle he contended for in respect to damages would be strictly applicable. But the same statute (sec. 73) affords a sufficient reason against stating a form or cause of action in the writ, for it provides that causes of action (except ejectment and replevin) of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit. Thus, though the form of action will not appear on the writ, which is intended only to bring the defendant into court to answer, the cause and form of action will appear in the declaration. If forms of action were treated as wholly superseded, questions would be continually arising as to the limitations for bringing the same created by statutes.

In England the sheriff is, by statute 5 and 6 Vic., ch. 98, sec. 31, liable only to an action on the case for damage, but with us he is liable to either an action of debt or on the case. The plaintiffs' declaration is in form a suitable declaration in debt. It is however equally suitable in case. The defendant has treated it as a declaration in case by pleading not guilty, but under the 103rd section of our C. L. P. Act it would have been dangerous for the plaintiffs to have treated this plea as a nullity, or have demurred to it.

I thought, however, at first that the plaintiffs had a right to insist that their declaration is in debt, and, if so, the right to recover the full amount of their claim against Morrow cannot be denied. My brothers are of a different opinion, and as the question really involves no more than the necessity of adding a few words to the declaration when the plaintiff means to declare in debt, I shall adopt their decision, as better calculated than my own first impression to preserve the

distinction between the two forms of action ; and concur with them in making the rule absolute.

HAGARTY, J.—If a sheriff commit a breach of duty in permitting the escape of a prisoner in execution, at common law an action on the case for a breach of that duty would be the proper remedy. The statutes 1 Rich. II., ch. 12, and 13 Edw. I., give an action of debt against the sheriff, and in such action the whole amount of judgment is recoverable, without reference to the value of the prisoner's custody. The words of the statute of Richard are, "the plaintiffs shall have their recovery against the warden by writ of debt." Our Court of Appeal has so determined.—*Brown v. Paxton*, 19 U. C. R. 426; *Kerr v. Fullarton*, 10 C. P. 250. (a)

If the plaintiff be not proceeding under the statute, but sues in case for the breach of duty, I understand the law to be, that the question of damages is open, and the sheriff may shew how little the plaintiff has lost by the escape.

Has the plaintiff in this case proceeded under the statute in debt, or at common law in case?

Making every allowance for the relaxation of distinctions between actions since the C. L. P. Act, I cannot read this declaration as other than in case, for damages for a breach of duty.

I understand the similarity now existing in counts in debt or assumpsit, and in all cases *ex contractu*. But in cases not *ex contractu*, but based on a breach of duty, a debt is not created, but a claim for damages arising from the wrongful breach. A statute interposes and allows debt to be brought. Whenever debt is so brought, I think we should be clearly able to gather from the declaration that the plaintiff's proceeding is based on statute law, or at all events, after stating the breach of the duty, there should be an averment that an action had thereby accrued to the plaintiff to demand and have the debt, &c.

The question before us is not whether this declaration might not be upheld after verdict as a good count in debt,

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(a) *Brown v. Paxton* was reversed, and *Kerr v. Fullarton* affirmed, on appeal. Neither of these cases in the Court of Appeal has yet been reported.

or after being pleaded to as such by defendant; but defendant has pleaded not guilty to it, evidently treating it as an open claim for damages, and the plaintiff does not object to such plea, but takes issue on it. Now the count may certainly be read as one in case, and it seems to me we should not be asked to uphold it as a possibly good count in debt under the statute, to the exclusion of evidence of the true amount of plaintiffs' damage.

It is not easy to find direct authority on the point. The action of debt on the statute cannot be brought in England since the Imperial Act 5 & 6 Vic., ch. 98, passed long before the C. L. P. Act, declaring that the action shall be brought on the case; consequently no form of a count in debt under our present system of pleading seems in the current books. In Bullen and Leake's Precedents, the pleader seeking for the frame of a count in debt either in what is called a popular or *qui tam* action, or by the party grieved, against a sheriff or other person, is referred to the forms used in a number of cases in point under the old practice, all of which are emphatically in debt on the statute.

One of the most modern cases there cited is *Holmes v. Sparkes*, (12 C. B. 242,) decided in 1852, the year of the first C. L. P. Act.

It was by the party grieved against the sheriff and bailiff for extortion, under 28 Eliz., ch. 4, framed in debt, and expressly referring to the statute, whereby the action had accrued to him, &c. There was a demurrer on account of a wrong date given to the statute. It was upheld, however, as the grievance was alleged to be contrary to the statute in such case provided, &c. This is merely one of a long list of cases.

In *Arden v. Goodacre*, (11 C. B. 375,) *Jervis*, C. J., says, "The recent statute has merely compelled the party to resort to the common law form of remedy, and although this form of remedy always existed, together with the action of debt against the sheriff for the recovery of the whole debt."

Therefore in England, up to the 5 & 6 Vic., ch. 98, an



action either of debt or case lay, plainly distinguishable in form. In Canada the law remains unaffected by that statute, and an action either of debt or on the case lies.

In *Kerr v. Fullarton*, (10 C. P. 254,) the learned Chief Justice says, "The creditor here \* \* may sue the sheriff in debt or in case, and it has always been considered more advantageous to sue in debt, because in that form of action the verdict must be given for the entire demand. The action on the case seems to have been resorted to when it was doubtful whether a caption of the debtor could be proved, and then after charging an escape in case in one count, a second might be added, charging negligence in not arresting when the sheriff had the opportunity."

Now the declaration before us is framed in the form given in case, and if we hold it as also framed in debt, we not merely declare there is no distinction between them, and that the one form answers both, but after the plaintiff has accepted the plea of not guilty, applicable not to debt but to case, and, as it were, has construed his own claim "*in mitiori sensu*," we decide that it necessarily bears the more oppressive form of debt.

I am not prepared to admit that the same form answers for both. The legislature has abolished many distinctions in pleading, but I do not think either law or practice has established that the same precise form of claim can be read equally as a claim for a breach of duty at common law, asking damages commensurate with the injury, and as a claim expressly given by act of parliament to a party grieved, beyond the common law remedy. I think the declaration is framed in case, and evidence of the value of the custody was admissible. (a)

MORRISON, J., concurred.

Rule absolute.

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(a) See the next case, as illustrating also the distinction between forms of action.

## HUNT V. MCARTHUR.

*Malicious Prosecution—Action for—Magistrate acting out of his County—Trespass maintainable, not Case.*

The declaration alleged that defendant falsely and maliciously, and without any reasonable or probable cause, procured one H. to appear before a magistrate, and charged defendant with obtaining money from Z. and others by false pretences, and upon such charge procured the magistrate to issue his warrant, and under it caused defendant to be arrested and brought before the magistrate, who having heard the charge dismissed it, and discharged him.

At the trial it appeared that the offence was alleged to have been committed by the plaintiff in the county of Middlesex, but the charge was made and the warrant issued in the City of London, by a J. P. for the county only, not for the city.

*Held*, that as the magistrate, acting out of his jurisdiction, had no authority whatever, the action was misconceived: that it was as if defendant had himself directed the arrest: and that trespass, therefore, not case, was the proper remedy;—and a nonsuit was ordered,

*Held*, also, that defendant was not precluded from objecting to the magistrate's jurisdiction, by having caused the application to him as such, there being nothing to shew that he did not really believe him to have authority.

DECLARATION.—For that the defendant, contriving and intending to injure the plaintiff, falsely and maliciously, and without any reasonable or probable cause, caused and procured one Thomas Henry to appear before one James Owrey, Esquire, one of her Majesty's Justices of the Peace in and for the county of Middlesex, and charged the plaintiff with obtaining from one Benjamin Zavitz, John Cutter, and others, sundry sums of money by fraud and false pretences; and upon such charge, and without any reasonable or probable cause, maliciously procured such justice to grant his warrant for apprehending the plaintiff and bringing him before such justice, or some other justices of the peace acting in and for the said county, to answer unto the said charge, and to be further dealt with according to law. And the defendant further contriving and intending as aforesaid, falsely and maliciously, and without any reasonable or probable cause, under and by virtue of the said warrant, caused the plaintiff to be arrested, and to be imprisoned for a long time, and afterwards to be brought before the said James Owrey, who having heard the said charge dismissed the same, and discharged the plaintiff out of custody. And by reason of the premises the plaintiff has been injured in

reputation, and suffered pain of body and mind, and for a long time was prevented from transacting his business, and incurred expenses, to wit, \$40, in defending himself against the said charge and obtaining his release from said imprisonment.

*Plea.*—Not guilty.

The trial took place at London, in November, 1864, before *Hagarty J.*

Evidence was given that the defendant instigated and procured Thomas Henry to make a charge against the plaintiff for obtaining money under false pretences, and that he brought Henry into the city of London, where he went before a magistrate for the county of Middlesex, but who was not in the commission of the peace for the city of London: that Henry then laid an information against the plaintiff, for obtaining money under false pretences at a place outside the city of London, but within the county of Middlesex. The money was stated to have been obtained from two persons who were named, and Henry claimed that the money was his. The magistrate thereupon issued his warrant, on which the plaintiff was arrested, and upon an examination of the case was discharged.

On the defence it was objected that the proceedings were void: that the magistrate had no authority within the city, and his warrant was consequently void, and the arrest under it illegal; and therefore that case would not lie. It was also objected that the evidence did not show a want of probable cause. Leave was reserved to move to enter a nonsuit on either or both objections, and after hearing evidence for the defence the case was left to the jury, who found for the plaintiff, damages \$150.

In Michaelmas Term *Becher*, Q.C., obtained a rule *nisi* pursuant to the leave reserved.

*J. B. Read* shewed cause during this term, citing *Atwood v. Monger*, Style 378, referred to in *Cotterell v. Jones*, 11 C. B. 719; *Pechell v. Watson*, 8 M. & W. 691.

*C. Robinson*, Q. C., supported the rule, and cited *Regina v. Row*, 14 C. P. 307; *Paley on Convictions* 16; *MacFar-*



lane v. Allan, 6 C. P. 496; Johnstone v. Sutton, 1 T. R. 544, referred to in Musgrove v. Newell, 1 M. & W. 582, per Alderson, B. p. 585, per Abinger, C. B. p. 587; Guest v. Warren, 9 Ex. 379, 383; Lock v. Ashton, 12 Q. B. 871; Chivers v. Savage, 5 E. & B. 697; Chy. Plg. vol. I, p. 149; Flewster v. Royle, 1 Camp. 187.

DRAPER, C. J.—The case of *The Queen v. Row*, (14 C. P. 307), is decisive as to the want of authority in the Justice of the Peace who took Henry's information and issued the warrant upon which the plaintiff was arrested. The next question is whether that is fatal to the present action, the declaration being in case.

*Lock v. Ashton* (12 Q. B. 871) is somewhat analogous, and establishes the distinction contended for. That action was trespass for assault and false imprisonment. The defendant had given the plaintiff into custody on a charge of felony, and had him taken before a magistrate, who heard the charge and remanded the plaintiff. When he was brought up again, it appeared that the charge of felony was founded on a mistake, and he was discharged. The declaration complained of the taking before the magistrate and the remand as distinct trespasses, and the jury gave damages for both. But the court held that the arrest was a trespass, the act of the defendant, while the remand was a judicial act, the act of the magistrate; and that damages for the latter wrong could not be recovered in an action of trespass.

*Chivers v. Savage* (5 E. & B. 697) recognizes the same distinction. There was a plaint in the county court for false imprisonment, over which the county court had jurisdiction. The plaintiff had been arrested by the police at defendant's direction on a charge of felony, which was unfounded in fact. The judge in giving judgment used expressions indicating that he gave damages in respect of the unfounded charge. The court held this to be no ground for a prohibition, for whatever objection might arise from his mode of treating the case, he had jurisdiction over the false imprisonment, which was the act of the defendant, who expressly directed the arrest of the plaintiff. If he had merely made a complaint and charge to

the police, on which they had themselves acted and taken the plaintiff into custody, the defendant would have been no trespasser.

The plaintiff treats the defendant as the real actor in the affair, and the jury have adopted and confirmed this view.

If the magistrate had been acting in his jurisdiction, and the arrest and imprisonment were only the consequence of the defendant's maliciously and without reasonable and probable cause putting the magistrate in motion, the present form of action would be right. But the magistrate was not so acting; he could neither entertain the complaint nor issue a warrant upon it, under the circumstances appearing; and then it is as if the defendant had himself directed the arrest of the plaintiff on an unfounded charge, in which case trespass is the proper remedy.

*Flewster v. Royle* (1 Camp. 188) was referred to by Mr. Robinson in his able argument as a case not very intelligible. In *Gosden v. Elphick*, (4 Ex. 445) *Alderson* and *Rolfe* B.B., express dissent from its ruling, and in *Grinham v. Willey* (4 H. & N. 496, 5 Jur. N. S. 444, which latter is the fullest report,) *Pollock* C.B. concurs in their observations.

I think the objection must prevail, and the rule to enter a nonsuit must be made absolute.

HAGARTY, J.—The complaint against defendant is that he maliciously and without probable cause set in motion the process of the law against the plaintiff's person; in other words, procuring his lawful arrest by unlawful means.

The proof, however, is that the supposed legal authority had no real existence, and the person issuing the warrant for the plaintiff's arrest was simply joining with defendant in committing a trespass on the plaintiff's person.

The action is therefore misconceived. But it is urged that defendant cannot be heard raising the objection to Owrey's jurisdiction, as he procured Henry to apply to him for a warrant as being a magistrate qualified to grant it. The fact of Owrey's not having any jurisdiction was not known to defendant, and there is no proof or suggestion that he was colluding with Owrey, that the latter should assume a character and jurisdiction that he did not possess.

*MacFarlane v. Allan et al.*, (6 C. P. 496), is much in point. Defendants were sued as bail on their recognizance, and they successfully defended themselves on the ground that the person who acted as commissioner in taking the bail had really no such character or authority. The learned Chief Justice says, "I do not see how it can be said that these defendants, by acts or words, made any wilful misrepresentations as to Allan's being a commissioner. From all that appears they believed him, as he swore he believed himself, to have competent authority."

The well known principle in *Pickard v. Sears*, (6 A. & E. 469), as explained in *Freeman v. Cooke*, (2 Ex. 660), and *Howard v. Hudson*, (2 E. & B. 1), does not, I think, govern this case.

Defendant made no wilful representation that Owrey was a magistrate, meaning it to be acted on by the plaintiff, nor did the plaintiff, I think, alter his position, or act upon such representation. Neither he nor defendant did in fact know that Owrey was not a magistrate. They both seemed to have treated him as if he filled that character.

If the plaintiff and defendant had a dispute about some matter cognizable by a magistrate, and, desiring to have it decided by him, the defendant should represent to the plaintiff that A. B. was a magistrate, intending that the plaintiff should act on this information, and thereupon the plaintiff did lodge his complaint before A. B., who entertained it and issued some process within a magistrate's jurisdiction against defendant's person or property, I can understand how plausibly in such a case the doctrine of *Pickard v. Sears* could be invoked to prevent defendant urging that A. B. did not hold the position he had represented him to have held. I suggest such a state of facts, not as holding that there the *quasi* estoppel would certainly prevail, but to illustrate the wide difference between that and the case before us, where no representation of any kind was made, but both parties seem to have believed and acted as if Owrey were duly qualified as a magistrate.

The rule for nonsuit must, I think, be made absolute.

It may be well for both parties to consider whether this



result may not afford an opportunity of coming to some arrangement, which might render another action unnecessary.

MORRISON, J., concurred.

Rule absolute.

### BLETCHER V. BURN.

*Action on replevin bond—Excuses for delay in the replevin suit—Measure of Damages—23 Vic., ch. 45—Effect of.*

Defendant replevied a schooner in September, 1862. Issue in fact was joined in the replevin suit in March, 1863, and issues in law also raised were disposed of in September, 1863, but nothing more was done. In February, 1864, an action was brought on the replevin bond by the plaintiff, as assignee of the sheriff, to which defendant pleaded only that he had prosecuted the replevin suit without delay.

As an excuse for not going to trial at the assizes which began on the 12th of October, 1863, defendant proved that he sailed in the schooner, as master, from Port Colborne, about the 1st of October, for Chicago, which he was prevented from reaching until the 25th, the usual time required for the voyage being about ten days; and that his attorneys, not knowing where he was, and getting no answer to their letters, countermanded the notice of trial. *Held*, no excuse, for it could not be presumed that defendant's presence was necessary for the trial, nor that his attorneys were not properly instructed before he left, or were in ignorance of his going; and if they were, *quære*, whether it would have made any difference, for issue had been joined since March, and there had been ample time, therefore, to give all necessary information.

The reason offered for not proceeding at the winter assizes, in January, 1864, was, that on the 7th of November, 1863, defendant filed a bill in Chancery against the plaintiff and others, relating to the title to this vessel, and praying, among other things, to restrain proceedings on the replevin bond. *Held*, also, no excuse.

*Held*, also, that the plaintiff was entitled to a verdict for the penalty of the bond, \$10,000.

*Quære*, as to the effect of 23 Vic., ch. 45, sec. 5, adding a new condition to the replevin bond. *Seemle*, that it gives no right to damages not before recoverable; and it does not bring such bond within the statute of Wm. III.

DECLARATION by the plaintiff, as assignee of the sheriff of Lincoln, that the defendant, with one R. M. and R. E., by their bond, dated 1st September, 1862, became bound to the said sheriff jointly and severally with the said R. M. and R. E., in \$10,000, subject to a condition, that if the defendant should prosecute his suit with effect and without delay against the plaintiff, for the taking and unjustly detaining of the schooner *Jane Anne Marsh*, and

should make a return of the said property, if a return thereof should be adjudged, and should pay to the plaintiff such damages as the plaintiff should sustain by the issuing of the writ of replevin in that cause, in which the defendant was plaintiff and the now plaintiff was defendant, if the now defendant should fail to recover judgment in the said suit, and if defendant should observe, keep, and perform all rules and orders made by the Court of Queen's Bench in the said suit, then the bond should be void. *Breach*.—That defendant did not prosecute the action of replevin without delay, whereby the bond became forfeited, and the sheriff assigned the same to the plaintiff, by means whereof an action hath accrued to the plaintiff against the defendant; and although the plaintiff hath sustained damages to \$10,000 by the issuing the writ of replevin, yet defendant has not paid the same, according to the condition of the bond; and the plaintiff claims \$10,000.

*Plea*, that the defendant did prosecute the said action of replevin without delay.

The issue was tried at the winter assizes for York and Peel, in January, 1865, before *Morrison J.*

It was proved that the replevin suit commenced on the 1st of September, 1862, and the declaration was filed on the 21st of the same month. On the 10th of March following pleas were filed, and issues in fact were joined on the 20th of March, 1863. Issues in law were joined in August, 1863, and judgment thereon was given in Trinity Term, 1863, (21st September, 1863.) Notice of trial was given for the fall assizes at Toronto, in 1863, and was countermanded, and nothing had been done since. This action was commenced on the 29th of February, 1864. A suit against bail, including the defendant, was commenced on the 16th of November, 1863, in which the declaration was filed on the 15th of December, 1863. The now defendant filed a bill in Chancery against the plaintiff, which suit was still pending, relative to the title of the schooner in question. The defendant offered evidence that the plaintiff had parted with his interest in the vessel. The learned judge ruled that the evidence must be confined to the issue raised on the plea. Both counsel then pressed for

a ruling on the right to recover damages, and the learned judge ruled that if the defendant failed upon the issue, the plaintiff would be entitled to a verdict for the penalty of the bond.

On the defence, it was proved that the countermand of the notice of trial was given because the now defendant's attorneys could not hear from him, and did not know where he was. He was sailing the schooner in dispute at the time. The bill in Chancery was filed on the 7th of November, 1863, between the parties to this suit and others, involving the question of title to the schooner, the defendant having acquired a further title to her. The counsel agreed that the bill might be put in to shew the state of facts which the witness would state was asserted in the bill. The plaintiff's counsel, however, objected that the evidence had no relation to the issue in this cause.

It was also proved that the defendant was master of the schooner, sailing her in October, 1863; that they left Port Colborne for Chicago about the 1st of October, and were run into, and returned to Port Colborne, and left again on the 3rd of October. A gale compelled them to run into Grand River. They arrived in Lake Michigan on the 16th of October, and met a severe gale, and had to run to Mackinaw to repair. They reached Chicago about the 25th of October; the usual length of the voyage being less than ten days. In January, 1864, they laid up at Chicago. In November, 1863, they sailed from Chicago to Collingwood, and arrived there about the 12th of November.

The learned judge directed the jury that these matters afforded no excuse for not proceeding in the replevin suit. The defendant's counsel objected to this direction, and a verdict was given for the plaintiff, subject to the objection.

*Moss* obtained a rule calling on the plaintiff to shew cause why a new trial should not be granted, for misdirection, in ruling that the evidence given shewed no excuse for delay, and that there was no evidence to go to the jury, and that it was not competent to the defendant to give evidence in mitigation of damages, but that the



plaintiff was entitled to a verdict for the full penalty of the bond ; and the verdict being against law and evidence, and for excessive damages.

*Wells* shewed cause, citing *Caswell v. Catton*, 9 U. C. R. 464 ; *Doe Robinson v. Allsop*, 5 B. & Al. 146 ; *Chy. Pl. Vol. I. p. 612.*

*Hector Cameron* supported the rule, and cited *Ruttan v. Short*, 12 U. C. R. 485 ; *Jackson v. Hanson*, 8 M. & W. 487 ; *Gent v. Cutts*, 11 Q. B. 288 ; 1 Wms. Saund. 58 ; *Ch. Arch. Prac.* 1091 ; *Mayne on Damages*, 265 ; 23 Vic., ch. 45, sec. 5.

DRAPER, C. J., delivered the judgment of the court.

The plaintiff in this cause was in possession of a schooner, which the defendant, by a writ of replevin, got into his possession in September, 1862. To accomplish this he had to give the bond sued upon in this action. Issue in fact was joined in the replevin suit so brought by the defendant on the 10th of March, 1863, and issues in law were also raised, which were disposed of in September, 1863, but the cause was not further proceeded with before the 29th of February, 1864, on which day this action was commenced, nor is it pretended that any further steps have since been taken. To this action, brought by the plaintiff as assignee of the sheriff, against the defendant, on the replevin bond, he has only pleaded that he prosecuted the replevin suit without delay, and to sustain that plea he has given evidence for not taking it down to trial at the assizes at Toronto, which began on the 12th of October, 1863, or those which began on the 7th of January, 1864.

The evidence applicable to the first occasion was, that about the 1st of October the defendant left Port Colborne in this very schooner for Chicago, which port he did not reach, owing to stress of weather, until the 25th of October, more than twice the time that the voyage usually required, and that his attorneys did not know where he was, though they wrote to him, but getting no reply countermanded the notice of trial they had given. As to the winter assizes, the evidence given (under objection from the plaintiff's

counsel) was, that the defendant had, on the 7th of November, 1863, filed a bill in Chancery respecting the schooner, against the plaintiff and others, praying, among other things, for restraining proceedings on the bond now sued upon.

We agree in the view taken by the learned judge, that the evidence was insufficient to prevent the bond from becoming forfeited for breach of the condition. From the 1st of September, 1862, the date of the bond, until the 29th of February, 1864, when this action was commenced, the action of replevin was not brought to trial. The writ and declaration in that cause were prompt enough. The delay in pleading until the 10th of March, 1863, cannot be attributed to the now defendant, but the delay since rests upon him. It is not shewn why the issues in fact were not tried in April, 1863, but the plaintiff does not set that up as a delay within the condition, and very possibly it was necessary to dispose of the issues in law first.

But the delay for the two following assizes is not, in our opinion, answered. It cannot be presumed, and it is not proved, that the defendant's presence was necessary to enable his attorneys to bring the cause to trial in October, 1863. Nor can we suppose that they were not instructed before he went away as to the witnesses who would support his case, or that they were in ignorance of his going. If this were so, then, considering that issue was joined in March, it would not strengthen the defendant's case, unless we can agree that the omission of his attorneys to ask for necessary information, or his neglect to give it, for nearly six months after issue joined, so excuses delay, because communication with him was impossible after the 1st of October till it was too late, as to save the condition of the bond.

The reason offered for not proceeding at the winter assizes appears to us equally inconclusive. The defendant is made to excuse the delay, which on the face of it was a breach of the condition, by setting up that he has instituted another suit in another court, by which, if successful, this action will be defeated altogether.

In *Gent v. Cutts*, (11 Q. B. 288,) *Erle*, J., remarks on the peculiarity and effects of this form of action, and his observations, though made upon replevin of a distress for rent, have no less force in this case. After stating that the tenant, on the strength of the replevin bond, (as here,) has his goods back, he says, "If the action is pending for any long time, there is danger that the value of the distress or the solvency of the sureties to the replevin bond may be affected by the delay." The motive for holding a plaintiff in replevin to reasonable diligence is stronger with us than in England, for there, as explained by *Coleridge*, J., in *Mennie v. Blake*, (6 E. & B. 849,) "it seems clear that replevin is not maintainable unless in a case in which there has been first a taking out of the possession *of the owner*;" and he observes further, "If, wherever a party asserts a right to goods in the peaceable possession of another, he has a right to take them from him by a replevin, it is obvious that the most crying injustice might not unfrequently result." The observations of my brother *Hagarty*, in *Crawford v. Thomas*, (7 C. P. 63,) are well worthy of notice, though by the more recent statute of 23 Vic., ch. 45, a salutary restriction has been put upon the general power, pointed out by *Coleridge*, J., as so dangerous, and which, however, existed under the former statute of 14 & 15 Vic., ch. 64. We refer also to *Henderson v. Sills*, (8 C. P. 68.)

As to the question of damages: it is argued for the defendant that the last statute, 23 Vic., ch. 45, which adds to the condition of replevin bonds as previously settled, brings those bonds within the statute of Wm. III., with all the incidents and consequences.

This statute requires the addition to such condition, "that the plaintiff" (in replevin) "do pay such damages as the defendant shall sustain by the issuing of the writ of replevin, if the plaintiff fails to recover judgment in the suit, and further, that the plaintiff do observe, keep and perform all rules and orders made by the court in the suit." We are not aware of any decision on the effect of this section.

The case of *Thompson v. Kaye*, (13 C. P. 251,) may at first sight appear to support the defendant's contention. To



a declaration on a replevin bond the defendant had pleaded payment of money into court, and an application was made to the court to refer to the Master to ascertain the damages, in case the sum paid into court was insufficient. But the court refused to withdraw the issue from the jury, "more especially considering the additional clause to the condition added by the late statute." It cannot be said that this decided the point now raised, nor that the decision would not have been the same if this statute had not been passed.

It does not appear to us that this statute is intended to give a new right to damages, that is, a right to damages not before recoverable; or if it must be held that by adding to the condition the legislature were conferring on the obligee a right not previously existing, that the consequence will be to alter the general character of the replevin bond, and to bring it within the statute of Wm. III.

So important a change as giving to the obligee a right to recover damages for the use of, or depreciation of value in, the thing replevied, and afterwards adjudged to be but not restored to him, in addition to the value of the thing itself at the time of the replevy, would surely be more distinctly expressed than by the words, "such damages as the defendant shall sustain by the *issuing* of the writ." Where the goods replevied had been seized as a distress, and a return was afterwards adjudged, we find no authority in English books for holding that the depreciation in the value of the distress, however injurious to the landlord, founds a claim for damages on his behalf.

Under the 11 Geo. II., ch. 19, the condition of the bond was sometimes taken to indemnify the sheriff, but this addition does not seem to have altered the character of the bond, nor to have changed the proceedings to be taken to enforce it. (See *Ca. Temp. Hardw.*, by Lee, 137.) The liability on the bond cannot exceed the amount of the penalty, (*Branscombe v. Scarborough*, 6 Q. B. 13;) and the action is so far under the control of the court that they can restrain the plaintiff from levying more than he is entitled to, (1 Wms. Saund. 58.) And in *Ruttan v. Short*, (12 U. C. R. 485,) this court seems to have acted on that principle,

for they refused to grant a motion based on the objection that breaches had not been suggested on the record, nor had any damages been assessed. The case of *Hedley v. Closter* (13 U. C. R. 333) is founded on the assumption that proceedings taken under replevin bonds under our statute, 14 & 15 Vic., (which so clearly extended the action of replevin to other cases than those of distresses,) might be stayed by the court on just terms. Both these cases, it is true, were before the statute 23 Vic., but we are not convinced that this act makes such a difference as the defendant's counsel contends for.

We do not understand that this verdict is taken for \$10,000 damages. It is, as we read the endorsement on the *nisi prius* record, a verdict for the debt, which is, in other words, the penalty of the forfeited bond, and one shilling for the detention, which one shilling is all that is given by way of damages.

We think, therefore, the rule must be discharged.

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#### BLETCHER V. MARSH AND EVERITT.

This was an action against the sureties for the defendant in *Bletcher v. Burn*, founded on the same bond. The pleadings were similar, and the trial took place at the same assizes. The difference in the facts was that this action was commenced before the January assizes, in 1864, and consequently the delay complained of was limited to the not proceeding to trial at the assizes in October, 1863. The learned judge held that on the facts proved there was no delay, and the plaintiff had a similar verdict.

The same rule was obtained as in the last case, and argued by the same counsel.

DRAPER, C. J.—For the reasons given in the other case, in regard to the not proceeding to trial in October, 1863, we think this rule should also be discharged. We will only add, that apparently the delay is from the time issue in fact

was joined, (*i.e.*, in March, 1863,) the assizes beginning on the 12th of October of that year. Possible reasons may be surmised for not going down to trial before, or even then; but the absence of Burn, and the difficulty experienced by his attorneys in communicating with him, was the only ground of delay proved and relied upon. We have expressed our opinion on this in the other case. In *Gent v. Cutts*, (11 Q. B. 288,) the delay was from the 1st of November to the 29th of February following, and it was held to be greater than is ordinarily the case where the plaintiff is anxious to proceed.

Rules discharged.

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### COFFIN V. DANARD AND RICHARDS.

*Lease—Surrender by operation of law—Evidence of—Pleading.*

To an avowry for distress for rent the plaintiff pleaded that before the distress he surrendered his interest in the term to defendant, and the said tenancy was put an end to and ceased by the defendant entering on the said premises by act and operation of law. A lease for five years was proved at \$150 a year, under which the plaintiff entered, and it appeared that before the end of the second year, and before the distress, defendant, having offered the plaintiff \$50 to allow him to take possession, went to live in the house. Defendant afterwards told a witness that he had let the place again to the plaintiff on shares, he, defendant, living on it as owner. He afterwards got the lease from this same witness, with whom it had been deposited by both parties, saying that it was of no use. The plaintiff also lived in the house, but the agreement was that defendant, and not he, should have the right of possession. These arrangements were verbal.

*Held*, that the facts proved clearly shewed a surrender by operation of law, and the plea, though inartificially framed, was in substance an averment that the term was thus surrendered before the distress; and that the plaintiff was entitled to recover.

DECLARATION, that the defendants took and detained, and still detain the goods of the plaintiff, to wit, &c., of the value of \$600, and the plaintiff claims a return, or their value, and damages for the detention.

*Avowry*, by Danard, because the plaintiff held the west half of lot No. 16, in the township of Hallowell, in the 2nd concession east of East Lake, as his tenant, under a demise, at the yearly rent of \$150, payable on the 1st of October in each year; and avows as a distress for rent due.



*Cognizance*, by defendant Richards, as bailiff to Danard.

*Plea* to both avowry and cognizance, that before the distress the plaintiff surrendered his interest in the said term to Danard, and the said tenancy was put an end to and ceased [by the said Danard entering on said premises by act and operation of law.]

The defendants took issue on this plea.

The trial took place in Picton, in November, 1864, before *Morrison, J.*

A lease from Danard to the plaintiff, dated the 27th of December, 1860, for the premises mentioned in the avowry, for five years, from the 1st of April, 1861, was put in, and the execution thereof by Danard and the plaintiff was admitted. It appeared that the plaintiff entered into possession under it. Before the expiration of the second year, the defendant Danard told a witness, who was examined, that the plaintiff did not pay his rent, and he requested this witness to see the plaintiff, and offer him \$50 to allow him, Danard, to take possession. The witness did tell the plaintiff, and on the 31st of December, 1862, Danard went to live in the house. In the following spring Danard told the same witness he had let the place to the plaintiff again on shares, he, Danard, living on it as owner, and since then the defendant worked the place with the plaintiff, and they divided the produce. In 1864 the arrangement was altered in some respects as to the shares, as the same witness was told by both parties. The first year's rent was paid, and in August, 1864, the defendant Danard came to the witness, with whom both parties had lodged the lease, to get it. This was before the distress, and the witness told him he could get the \$100, as the witness had made arrangements to get it for the plaintiff, the defendant Danard not denying he had made an agreement to take back the place from the plaintiff, and allow him the \$50. The defendant Danard told this witness of both these agreements, made since the lease; both were verbal. Danard was living on the place, and said the plaintiff gave it up, and that the lease was of no use.

Another witness proved he was present when the verbal

agreement was made, in the spring of 1864, when it was arranged that Danard should have two-thirds of the grain raised, and this witness saw the grain divided between them both in 1863 and 1864. This witness said that part of the agreement of 1864 was that Danard, and not the plaintiff, was to have the right of possession, so as to enable Danard to work the place himself if the plaintiff did not. Danard was then in possession of the premises, the plaintiff living in the same house. The premises had been in the plaintiff's exclusive occupation under the lease until the verbal agreement of 1863, and then Danard went and lived upon them.

The plaintiff's plea was amended after this evidence was given, by adding the words within brackets.

A nonsuit was moved for, because there was no surrender in law, nor by deed under seal; and if there had been a surrender it did not affect the right of Danard to the second year's rent; and the evidence did not sustain the plea. The plaintiff then asked to be permitted to add a plea of *non tenuit*, and one of ouster, which was refused, and the learned judge directed a verdict for the plaintiff, with leave to defendant to move to enter a nonsuit.

In Michaelmas term *C. S. Patterson* obtained a rule *nisi* for a nonsuit, pursuant to leave reserved, or for judgment *non obstante veredicto*, as the matters alleged in the plea afford no answer to the avowry and cognizance; or for a new trial, for misdirection, in ruling that there was evidence of a surrender, and the verdict being contrary to law and evidence. He cited *McNeil v. Train*, 5 U. C. R. 101; *Phenè v. Popplewell*, 8 Jur. N. S. 1104, *Pellatt v. Boosey*, Ib. 1109; *Lyon v. Reed*, 13 M. & W. 288.

*A. Richards*, Q. C., shewed cause during this term, citing *Woodf. L. & T.*, Ed. 1863, pages 263-265; *Add. Torts*, 434; *Phenè v. Popplewell*, 12 C. B. N. S. 334; *Lewis v. Brooks*, 8 U. C. R. 576; *Elsworth v. Brice*, 18 U. C. R. 441; *Williams v. Stiven*, 9 Q. B. 14; *Chy. Pl.* Vol. I., pp. 705, 711.

DRAPER, C. J., delivered the judgment of the court.

Mr. Patterson, on the argument, admitted that the facts proved amounted to a surrender in law, but he insisted the plea was bad. The case of *Phenè v. Popplewell*, cited by Mr. Richards, (12 C. B. N. S. 334, 8 Jur. N. S. 1104,) is a clear authority in the plaintiff's favor to establish that the evidence proved a surrender by act and operation of law. The plea is certainly very inartificially framed, but the substance of the averment is, that the plaintiff's term was surrendered and at an end by act and operation of law before the distress was made, and that was proved.

We think the rule should be discharged.

We refer to *Smith v. Lovell*, (10 C. B. 6,) *Gore v. Wright*, (8 A. & E. 118,) *Turner v. Hardey*, (9 M. & W. 770,) with the other cases referred to in 8 Jur. N. S. 1104.

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MCLEAN ET AL. V. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

*R. W. Co.—Warehouse receipts—Error in quantity—Liability to third persons.*

Defendants, a railway company, gave warehouse receipts to one B. for 7,500 barrels of flour as in store for him, on the faith of which the plaintiffs accepted and paid bills drawn upon them by B.; and there being a deficiency of 192 barrels, they sued defendants as for a false and fraudulent representation made by them, which they knew would, in the course of trade, be relied upon by persons dealing with B. The evidence shewed that defendants knew such receipts were commonly used to obtain advances of money upon, and that they sometimes gave receipts to B. for flour in advance, on being told that it was on the way; but how the mistake in question occurred was not shewn.

*Held*, that upon this evidence there was a case to go to the jury in support of the declaration, and that a verdict for the plaintiffs must be allowed to stand, although they might well have found otherwise.

See the former report of the case, 23 U. C. R. 448.

This case, reported in 23 U. C. R. 448, was again tried at Brantford before *Draper*, C. J., and a verdict found for the plaintiffs, on a charge according to the law laid down in that report. The evidence was substantially that given at the first trial, and is stated in the previous report. Alexander Bunnell swore that he had sometimes got a receipt for 100 barrels before they were in defendants'



store, and while they were on the way, and that he wanted to draw against the flour receipted.

*E. B. Wood* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence and the judge's charge.

*Galt*, Q. C., shewed cause.

*McMichael* and *Robert A. Harrison* supported the rule, citing *Evans v. Collins*, 5 Q. B. 804; *Thom v. Bigland*, 8 Ex. 725; *Behn v. Kemble*, 7 C. B. N. S. 260; *Barry v. Croskey*, 2 Johns. & H. 1; *Cowan v. Lascelles*, 3 F. & F. 631.

HAGARTY, J., delivered the judgment of the court.

The doubt still remains unsolved as to how the mistake in fact occurred, as to any particular quantity of flour; and we think the jury might, without difficulty, have found for the defendants on the case presented to them.

We do not see any difficulty in the objections urged on the want of proof of the fraud charged in the declaration. The rule is laid down in *Swinfen v. Lord Chelmsford* (5 H. & N. 920) thus: "We are all of opinion that if a declaration discloses a state of facts upon which an action may be maintained although there be neither malice nor fraud, the plaintiff is not bound to prove either, *though both be alleged*, and may recover upon the liability which the facts disclose, *though fraud and malice be disproved*."

Nor is it necessary to decide whether the declaration would be good or not if all words imputing fraud were expunged, as we are of opinion that on the evidence the case had to be submitted to the jury as it stood charged in the declaration.

We repeat our expression of dissent from the doctrine urged by the plaintiffs, that the mere fact of a variance between the quantity of flour expressed to be received in store in defendants' receipts, and the actual amount forthcoming, gives a cause of action against them to any person advancing money on the receipts on the faith of such quantity being in defendants' hands, when in fact it was not. As there was no privity between plaintiffs and defendants,

we think the former bound to go beyond the mere proof of the fact of variance. It is not easy to understand how, in the case of a mere mistake, without bad faith or wilful error, any action can be maintained by a third person, a stranger to the actual dealing between the parties in which the error arises.

The evidence here, we think, discloses that the railway company must have been well aware, from the course of business, that these receipts for flour were used to obtain advances of money. It also shews that defendants, as a matter of fact, did sometimes give receipts for flour before they actually received it in store, on being told that it was "on the way."

If therefore the defendants, knowing the purpose for which these receipts were to be used, chose to declare in writing that they actually had, say 100 barrels, in their warehouse, because Bunnell told them it was coming, or on the way, they must take the risk of their trust in his assurance. They state what is false in fact, and what they confessedly know to be false in fact. If so, we think they must take the peril of the opinion a jury may form of their conduct.

The law is thus expressed by *Wood*, V. C., in *Barry v. Croskey*, (2 Johns. & Hem. 23,) "Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss."

Granted that those who give the receipt false in fact, as they know, are aware that the holder will apply or offer it to any third person to procure an advance of money, we think we must hold that any person so advancing money upon it is a person coming within the intent of the parties, although not individually in the mind or intent of defendants at the time. The language of the case last referred to supports this view, in its comments on the case of *The National Exchange Company of Glasgow v. Drew*, (2 Macqueen H. L. Cas. 103.)

It is quite true that it is still in doubt how the error as to the short delivery arose, and whether it was connected with any of the receipts so given for flour on the faith of its being said to be on the way.

Still we think that having once established that in the course of Bunnell's dealing with defendants they had, as a matter of fact, given receipts knowingly incorrect at the moment they were given, there was a case to go to the jury in support of the declaration; and we cannot say their verdict is so wholly wrong that we should set it aside.

In examining the authorities on this very peculiar branch of the law, some possible difficulties have suggested themselves, but as neither the pleadings nor the points taken by counsel involve their decision, we deem it unnecessary to discuss them.

Rule discharged.

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BARTON V. THE CORPORATION OF THE TOWN OF DUNDAS  
AND W. F. PARSONS.

*Taxes—Proof of demand—Entry made by deceased collector.*

In replevin for goods sold for taxes, the plaintiff having succeeded for want of evidence of any demand by the collector, defendants moved for a new trial on affidavits shewing the discovery, since the trial, in the collector's blank receipt book, opposite to the receipt intended to have been given for these taxes, of a minute made by the collector, "Wrote January 21st, 1864." The death of the collector was shewn, but not when he died, nor when the entry was made, nor that it was in the usual course of business to make such an entry.

*Held*, that it would be insufficient to establish a demand, and a new trial was therefore refused.

REPLEVIN for goods taken in a mill or woollen factory, in the town of Dundas.

*Pleas*.—1. *Non ceperunt*. 2. Goods not the property of the plaintiff. 3. Plaintiff not possessed of the goods. 4. That at the time when, &c., one Blankenburgh MacNab was indebted to the defendants in the sum of \$310, in respect of certain taxes before then levied and assessed against him, and the same not having been paid within



fourteen days after demand of payment by the collector of taxes for the said defendants, the said goods being in possession of the said MacNab, were taken as a distress for the said taxes and the costs of the distress. The foregoing pleas were by the corporation.

The defendant Parsons pleaded *non cepit*, by Consol. Stat. U. C., ch. 55, secs. 96, 103, 104, and ch. 126, secs. 11 and 12, Public Acts.

The plaintiff joined issue on all the pleas.

The trial took place at Hamilton, in November last, before *Adam Wilson, J.*, when the plaintiff obtained a verdict.

In Michaelmas Term *Moss* obtained a rule calling upon the plaintiff to shew cause why a new trial should not be granted, on the ground of the discovery of fresh evidence since the trial of this cause, and on grounds disclosed on affidavits and papers filed.

The only affidavit was that of Edwin Woodhouse, town clerk to the defendants, who was examined as a witness at the trial. He stated that before the trial he made diligent enquiries and searched for evidence of a demand having been made by John Gamble, the late collector of the defendants, for the taxes due by one Blankenburgh MacNab to the defendants for the years 1861 and 1863, and that he was unable previous to the trial to discover any evidence of the said demand having been made, except certain statements made to himself, as town clerk, by the said John Gamble as such collector: that since the trial he had caused a further search to be made, as well among the books of the town as of the collector's blank receipt book, and other papers not in his possession or control previous to the trial; and he had found in the receipt book, and opposite to the receipt intended to have been handed to the said MacNab on payment of his taxes for 1863, a minute in the handwriting of the said John Gamble, in the words and figures following: "Wrote January 21st, '64;" and he annexed a copy to his affidavit: that at the date of that minute Gamble was collector of the defendants, and the said blank receipt book was then in his possession, and

used by him in the discharge of his duties as collector : that such blank receipt book was made out by the collector under a by-law of the town, and was their property.

*Burton*, Q. C., shewed cause during this term, citing *Brain v. Preece*, 11 M. & W. 773 ; *Doe Patteshall v. Turford*, 3 B. & Ad. 898 ; *Regina v. Inhabitants of Worth*, 4 Q. B. 132.

*Moss*, in support of the rule, cited *Rawlins v. Rickards*, 28 Beav. 370 ; *Pool v. Dica's*, 1 Bing. N. C. 649 ; *Nichols v. Goldsmith*, 7 Wend. 160.

DRAPER, C., delivered the judgment of the court.

The fact of the death of Gamble was proved, but neither in the evidence at the trial, nor yet in the affidavit now before us, does it appear when he died. It was sworn he was dead at the time of the trial, but that was in November, 1864. His handwriting and his official character as collector were sufficiently shewn.

The next question is, does it sufficiently appear that the entry was made contemporaneously with the act to which it relates. The entry is on a paper as follows :

" Wrote Jany. 21st, 1864."

"No. 287. Canal Ward. Dundas.....1863.		No. 287. Assessed yearly value of property \$700		Canal Ward, town of Dundas, 1863.	
Arrears of 186.....\$		Arrears of 186.....\$			
For general purposes,		For general purposes,		Received from Blanken-	
1863.....\$	105 00	1863.....	105 00	burgh MacNab, the sum of	
County rate.....	17 50	County rate .....	17 50	two hundred and eleven dol-	
School rate.....	17 50	School rate.....	17 50	lars, being the amount of as-	
S fund.....	21 00	S. fund.....	21 00	sessment due, as per margin,	
Statute labor.....		Statute labor.....		to 31st December, 1863.	
One dog.....	1 00	One dog.....	1 00		
Government rate...	49 00	Government rate...	49 00	Collector.	
\$211 00		\$211 00			
Blankenburgh MacNab.					

The whole minute which is to be considered now is in the few words, "Wrote Jany. 21st, 1864." That Gamble was living on the 5th of February following appears from the distress warrant of the latter date, signed by him, and put in evidence at the trial. The words of *Parke*, J., in *Doe v. Turford*, (3 B. & Ad. 898,) are very strong: "It is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." See also *Poole v. Dica's*, (1 Bing. N. C. 649,) per *Tindal*, C. J.

There is nothing to shew us when it was made, and no presumption can arise from the contents of the entry itself.

Next, it should be shewn that this entry was made *in the usual routine of business*. And here the proof offered seems to us wholly deficient. So far from this being an entry such as the deceased collector was in the usual habit of making, it would rather seem from the evidence tendered at the trial that the town clerk had advised him in this instance to send a written notice, as if this was not the ordinary course; and there was not the slightest evidence that he had on any other occasion made a minute of a demand made of a ratepayer, under section 94 of the Assessment Act, or of a statement and demand transmitted by post, according to section 95, to a rate-payer resident out of the municipality, nor does the affidavit suggest that there is any such evidence. And looking at the words of the minute, it is somewhat difficult to say that the word "Wrote" must or ought to be interpreted, "Wrote to Blankenburgh MacNab a statement and demand of the taxes charged against him."

We think the application fails from the insufficiency of what it is sworn is the new evidence discovered to establish the fact of a demand on Blankenburg MacNab, and that it is therefore unnecessary to determine the other question raised on the argument.

Rule discharged.

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## SPENCE V. HECTOR.

*Assignment of lease—Covenant by assignee to indemnify—Action by lessee upon  
—Right to recover costs of suit brought by lessor—Interest.*

Defendant took an assignment of a lease from the plaintiff, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence. *Held*, that under defendant's covenant to indemnify him, the plaintiff was entitled to recover the damages and costs in that suit, but not to interest. When there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering, *Quære*, whether, when sued on the covenant, he can dispute the liability of the covenantee to the damages so recovered.

Interest is in practice much more frequently allowed by our juries than English authority would seem to warrant.

Want of direction is no ground for a new trial, unless the verdict is against evidence.

THE DECLARATION stated that by indenture the plaintiff leased from one Montgomery certain premises for ten years, from the 1st of July 1852, and covenanted with Montgomery to pay rent, and upon getting possession to repair the premises, and to keep them during the term in good order and condition, and at the expiration of the term to deliver up the premises well and sufficiently repaired, &c.: that the plaintiff entered into possession—of which premises the defendant had notice: that during the term, on the 1st of June, 1854, the plaintiff assigned the premises to the defendant, to hold for the residue of the term; and defendant, by the indenture of assignment, covenanted with the plaintiff to perform, &c., all the covenants in the lease on his part to be performed, and to keep the plaintiff indemnified from the payment of the rent and the performance of the covenants: that defendant, by virtue of the assignment, entered and became possessed, &c., during the residue of the term, which ended on the first of July, 1862. The declaration then averred performance of covenants on the plaintiff's part, and stated that defendant, after he became possessed, did not, during the residue of the term, pay the rent, nor keep the premises in repair, nor yield up at the end of the term the same premises well and sufficiently

repaired, nor, after assignment, keep the plaintiff indemnified from payment of rent and performance of the covenants, but defendant neglected to pay Montgomery a half year's rent, due on the 1st of July, 1862, and permitted the premises to be and the same were out of repair, ruinous, &c.; and at the end of the term the premises were left in such bad repair that by reason thereof, and of the omission of defendant to indemnify the plaintiff, Montgomery brought an action for breach of covenant in non-payment of rent, and non-performance of the said covenants, of which the defendant had notice, which action the plaintiff, at the special instance of defendant, defended, and Montgomery recovered against the plaintiff £125 damages, and £49 9s. 1d. costs, which sums the plaintiff had to pay, together with £75 costs of defending the action.

*Second count* in case, for not performing the same covenants.

*Pleas.*—1. To first count, as to the assignment, *non est factum*.

2. To the first count, traverse of plaintiff's performance of covenants.

3. As to so much of the first count as is not pleaded to by the 4th and 5th pleas, payment of the rent during the residue of the term.

4. As to so much of the first count as is not pleaded to by the 3rd and 5th pleas, that defendant did, during the residue of the term, keep the premises in repair.

5. As to so much of the first count as is not pleaded to by the 3rd and 4th pleas, that defendant, at the end of the term, delivered up to Montgomery the premises well and sufficiently repaired.

6. To the first count, that the plaintiff was not damnified.

7. To the first count, that if the plaintiff was damnified it was his own wrong.

8. To the first count, that the plaintiff did not defend the action at defendant's special instance.

9. To the first count, that Montgomery recovered damages through the negligence of the plaintiff and his attorney in the action.

10. To the first count, that the damages were not recovered for breaches of the plaintiff's covenants accruing while defendant was in possession under the assignment.

11. To the second count, not guilty.

12. To the second count, denial that the plaintiff kept the covenants to be by him performed.

13, 14, and 15. To the second count, similar to the 3rd, 4th and 5th to the first count.

16, 17, 18, 19, and 20. To the second count, respectively similar to the 6th, 7th, 8th, 9th, and 10th pleas to the first count.

The plaintiff took issue on all the pleas.

The case was tried at the winter assizes for York and Peel, before *John Wilson, J.*

The plaintiff gave evidence of the lease from Montgomery to the plaintiff, and the assignment to the defendant. He also gave evidence as to the repairs made by himself while in possession, and as to the want of repair and dilapidation of the premises since. He also put in evidence an exemplification of the judgment recovered by Montgomery against him, and proved that the defendant requested him to defend that suit, and that he did so. That judgment was entered on the 2nd of February, 1864, for £125 damages, and £49 9s. 1d. costs. The plaintiff also proved that his costs of defending that suit were \$118, and he claimed interest on his outlay. The defendant went into evidence to shew that he had repaired the premises while he held them, and that they were in a tenantable state of repair when he gave them up. It appeared that there had been a large stable and driving-house on the premises, which, to prevent a fire spreading from adjoining premises, were pulled down. A smaller stable had been erected by defendant, which was stated to be large enough for the tenants, but was not a restoration of what had been removed.

The learned judge directed the jury that the defendant was bound to keep the premises in repair from the time he got them, as the plaintiff had covenanted to keep them: that with regard to the building that was torn away to prevent the fire from spreading, the defendant was bound



to put it in as good condition as it was when he got it, and that if any of the old materials were lost, he was bound to make them good, and if all the materials were lost, he was bound to put in new. He told them to find the damages and the items for costs separately, that the court might apply the finding as the law warranted.

They gave a verdict for the plaintiff on all the issues, damages \$500, costs of Montgomery's suit, \$198, costs of plaintiff's defence of that suit \$118, interest \$60, in all \$876; with leave reserved to defendant to move to reduce the verdict by striking out any of these items. They found, also, on being asked, that the defendant had notice of the suit of Montgomery against the plaintiff.

In Michaelmas Term *Moss* obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection, in telling the jury that the defendant's liability did not depend on the state in which he received the premises from the plaintiff, and that the defendant was bound to put and keep the premises in as good repair as the plaintiff was bound to have done, and that it was not sufficient for the defendant to keep them in as good repair as he received them, reasonable wear and tear excepted; and for directing that if the stable was wholly destroyed by accident it was defendant's duty to build a new one of the same kind, and not one which would equally well answer all the purposes for which a stable was ever used on those premises; and for not telling the jury that they should take into consideration the age and general state of the buildings, and refusing to tell them that in case defendant had not replaced the stable, the maximum of damages would be the value of the stable at the time of the assignment to the defendant, or of the demise to the plaintiff; or why the verdict should not be reduced by the amounts allowed to the plaintiff for costs and interest, or for interest only.

*Blevins* and *Robert A. Harrison* during this term shewed cause, citing *Smith v. Howell*, 6 Ex. 730; *Williams v. Burrell*, 1 C. B. 402; *Howes v. Martin*, 1 Esp. 162; *Blyth v. Smith*,

5 M. & G. 405 ; Neale v. Wyllie, 3 B. & C. 533 ; Burnett v. Lynch, 5 B. & C. 589 ; Penley v. Watts, 7 M. & W. 601 ; Walker v. Hatton, 10 M. & W. 249 ; Payne v. Haine, 16 M. & W. 541, S. C., 16 L. J. Ex. 130 ; Haldane v. Newcomb, 9 L. T. Rep. N. S. 520, S. C., 12 W. R. 135 ; Cornish v. Cleife, 11 L. T. Rep. N. S. 606 ; Arch. L. & T. 2nd Ed. 179, 180 ; Woodf. L. & T. 439, 445 ; Maddock v. Mallet, 12 Ir. C. L. Rep. 173 ; Bell v. Hayden, 9 Ir. C. L. Rep. 301 ; Elwes v. Christophers, 1 F. & F. 697 ; Borgnis v. Edwards, 2 F. & F. 111.

*Moss*, contra, cited Mayne on Damages, 135 ; Smith v. Douglas, 16 C. B. 31.

DRAPER, C. J., delivered the judgment of the court.

The objections to the learned judge's charge are very much amplified in the rule from the statement of them on his report of the trial. The want of direction is not a ground for a new trial, unless the jury have found against the evidence. And the greater part of the objections taken lose all weight when it is remembered that the plaintiff is suing on a covenant to indemnify, and the defendant had express notice of Montgomery's action against the plaintiff, and according to some of the witnesses sanctioned the defence.

The cases cited on the argument of Williams v. Burrell, Smith v. Howell, and Stuart v. Matheson, support the verdict, except as to interest. In Penley v. Watts, (7 M. & W. 601,) there was no contract to indemnify, and the costs were not allowed ; but *Parke*, B., draws that distinction as affording the reason for refusing them, and Neale v. Wyllie, (3 B. & C. 533,) which decided that the costs of defending a suit where the covenant of the underlessee was only to repair, and not to indemnify, might be recovered as special damage in an action against him, appears to be overruled by Walker v. Hatton, and Smith v. Howell.

None of these cases, however, sustain the claim for interest, and Williams v. Burrell is directly opposed to it. Interest is in practice much more frequently allowed by our juries

than English authority would seem to warrant. It is not proved that the plaintiff has paid the money; it is only said he has settled with Montgomery, which may mean a very different thing. We have no doubt the rule must be discharged on every other point.

We guard ourselves against being supposed to hold that where there is a covenants to indemnify, as here, and the recovery against which the indemnity was to be given was obtained without collusion, and, still more, where the right to such recovery was fairly disputed, and the covenantor to indemnify had, as here, the opportunity of intervening, that he can, when sued on the covenant to indemnify, dispute the liability of the covenantee to the damages recovered against him, or try that question a second time.

Rule discharged.

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### COVERT V. ROBINSON.

*Ejectment—Proof of title—Secondary evidence—Memorial—Insufficient search.*

In ejectment the plaintiff proved a mortgage to him in fee from one B., and called a witness who swore that he purchased from one P. the east half of the lot, of which this land was part, excepting nine acres: that P. had been in possession of the east half since 1850, and gave B. possession of the land sued for before witness purchased the remainder from P., and that defendant told him he had bought from B. When defendant entered, or under what right, did not appear. *Held*, sufficient *prima facie* evidence of title in the plaintiff as against defendant.

B. was absent from the country, and the plaintiff proved a search with several of his relatives for the deed from P. to him, but it was not shewn that he had lived or left the charge of his papers with any of them. Secondary evidence being then admitted, subject to objection, he proved the existence of this deed, and the execution by P. of a memorial of it, which the deputy registrar produced.

*Held*, that the search was not sufficient to let in secondary evidence; and if it had been, *quære*, whether the memorial would have proved the deed as against defendant.

EJECTMENT for a part of lot No. 17, in the third concession of Alnwick, described by metes and bounds. The defendant limited his defence to a part thus described: Commencing at the south end of the said lot, at the distance of thirty feet west from the south-east corner of said lot;



then north  $16^{\circ}$  west six chains forty-nine links, to the front of said lot; then north  $74^{\circ}$  east one chain; then south  $16^{\circ}$  east six chains forty-nine links, to the front of said lot; then south  $74^{\circ}$  west one chain, to the place of beginning. The plaintiff claimed title under a deed from William Burrows. The defendant claimed title under a deed from William Burrows and wife.

The case was tried at Cobourg, in October last, before *Morrison, J.*

The plaintiff proved a deed, dated the 18th of September, from William Burrows, conveying to him in fee by way of mortgage the parcel of land described in the ejectment summons. He also called a witness, who swore that he purchased from one Post the east half of lot No. 17, in the 3rd concession of Alnwick, excepting nine acres: that Post had been in possession of the east half from October, 1850, and that he gave Burrows possession of the land described in the ejectment summons, before the witness bought the remainder of the half lot from Post. He also proved that the defendant was living on a part of the land which Post had sold to Burrows, and that he had been told by defendant that he (defendant) had bought from Burrows.

The plaintiff also gave evidence of searches for a deed said to have been given by Post to Burrows, who was not now in Upper Canada. The searches were made at the residences of certain relatives of Burrows, none of whom, so far as was shewn, had ever had charge or possession of any of his deeds or papers, nor had Burrows lived with any of them, or left any deeds or papers at their respective residences. The plaintiff was then permitted to give secondary evidence of the contents of this deed, leave being reserved to the defendant to move to enter a verdict for him if the evidence was inadmissible. The existence of a deed from Post to Burrows was then proved, and that this deed was used or referred to for the purpose of preparing the mortgage from Burrows to the plaintiff. To prove the execution of this deed a memorial of a deed from Post to Burrows, which had been registered on the 2nd of September, 1853, was produced by the deputy-registrar, and the signature of Post to that memorial was proved.

On this evidence the plaintiff got a verdict, with leave reserved to the defendant to move as above. The defendant had been served with notice to produce a deed from Burrows to himself, but no such deed was produced.

In Michaelmas Term *Hector Cameron* obtained a rule calling on the plaintiff to shew cause why a verdict should not be entered for the defendant on the leave reserved.

*C. S. Patterson* shewed cause during this term.

*Moss* supported the rule, citing *Brest v. Lever*, 7 M. & W. 593; *Doe Harding v. Cooke*, 7 Bing. 346; *Doe Padwick v. Wittcomb*, 6 Ex. 601; *Regina v. Saffron Hill*, 1 E. & B. 95; *Ansley v. Breo*, 14 C. P. 371.

DRAPER, C. J., delivered the judgment of the court.

We are of opinion that no sufficient foundation was laid for the admission of secondary evidence of the alleged deed from Post to Burrows, and as at present advised, I am not satisfied that the proof of the execution of the memorial of that deed by Post would have proved it against the defendant; at least I think it very doubtful.

But it also appears to us that as against the defendant, who shews no title, and only asserts that he bought from Burrows, the plaintiff made out a sufficient *prima facie* title. He proved that Post had been in possession of this east half from October, 1850, until he transferred the possession of the part in dispute to Burrows, who had been in possession until the defendant entered. The time at which defendant entered, and by what right or title, was not shewn, but it was proved that in September, 1857, Burrows mortgaged the land defended for, and more, to the plaintiff, and the defendant admitted that he came in under Burrows. We think therefore, on the facts appearing, the plaintiff is entitled to hold his verdict, though he has failed in tracing a paper title from Post. We certainly should not order a verdict for the defendant.

Rule discharged.

## ROBINSON V. GORDON ET AL.

*Appeal—Allowance of bond—Right to enter judgment after—Judge's order—Effect of.*

A rule *nisi* for a new trial having been discharged, the defendant gave notice of appeal, and obtained a judge's order to stay proceedings until the appeal bond should be entered into by the plaintiff, or until there should be a rule allowing him to proceed. The appeal bond was marked "allowed" by a judge in Chambers, after which the plaintiff entered judgment on his verdict. On motion to set aside this judgment,

*Held*, that the order ceased to stay proceedings after the appeal bond had been allowed: that such allowance was a supersedeas of execution only; and that the judgment, therefore, should be allowed to stand, subject to the decision in appeal.

A rule was granted in the Practice Court, returnable here, calling on the plaintiff to shew cause why the judgment entered in this cause should not be set aside. It was objected that the judgment had been entered after a judge's order had been made and served, by which further proceedings in the cause were stayed until a fixed day, and until the appeal bond be entered into by the plaintiff, or until there should be a rule or order allowing the plaintiff to proceed.

There had been a rule granted to shew cause why a verdict for the plaintiff should not be set aside and a new trial be granted, which rule was, after argument, discharged at the sittings after Michaelmas Term, 1863. (a) The defendants had leave to appeal, and having given notice of appeal, obtained the foregoing order from the Chief Justice of this court. On the 25th of January, 1864, the appeal bond having been produced before *Morrison, J.*, at Chambers, was by him marked "allowed." Some time afterwards this judgment on the verdict was entered.

*J. B. Read* shewed cause. *Boyd* supported the rule.

The argument for the defendants was, that either the bond for the appeal was not a security perfected by the endorsement of the allowance, or that if perfected the plaintiff could not proceed in this cause until the appeal was disposed of.

For the plaintiff it was answered that the allowance of the bond as a sufficient security was all that the judge's order



was intended to give time for: that as soon as this was done, which was after the day to which proceedings were stayed, the restriction created by that order ceased, and that an appeal against the decision by which a new trial was refused did not remove the cause from this court, or prevent proceeding in it, subject of course to the decision of the appeal.

The following cases were cited: *Gilmour v. Hall*, 10 U. C. R. 508; *Torrance v. McPherson*, 11 U. C. R. 200; *Grant v. Great Western Railway Company*, 8 C. P. 348; *Rowe v. Jarvis*, 14 C. P. 244; *Bank of Upper Canada v. Pottroff*, 8 U. C. L. J. 328; *Gamble v. Howland*, 3 Grant 306; *Murphy v. Northern Railway Company*, 13 C. P. 32; *Washburn v. Powell*, 2 O. S. 465; *Cotton v. Corby*, 5 U. C. L. J. 67; *Duffil v. Dickenson*, 14 C. P. 142; *Doe v. Carr*, 16 Q. B. 117; *Doe v. Wright*, 10 A. & E. 763; *Wheelton v. Hardisty*, 8 E. & B. 232, 285; *Hunt v. Allgood*, 3 F. & F. 155. The Orders of the Court of Error and Appeal, Nos. 2, 5, 6, 8, 12, 13, 14, 27, 28, published in 2 Grant; and Consol. Stat. U. C. ch. 13, secs. 9, 15, 16, 17, 23, 24, 31, 35, 42, 43, were also referred to.

DRAPER, C. J., delivered the judgment of the court.

We have looked at all the cases cited, but cannot find much aid from them. As to the question arising under the judge's order, we are of opinion that it did not operate as a stay of proceedings after the appeal bond had been allowed.

We are further of opinion that an appeal against the decision of the court on a motion for a new trial, after the allowance of the security, is a *supersedeas* of execution only, (sec. 35 of the Appeal Act,) and does not restrain other proceedings. We thought at the beginning of the argument that the entry of the judgment would create a difficulty, if there was a decision by the Court of Appeal that there ought to be a new trial. But if a party who has obtained a verdict chooses to enter up his judgment thereon, taking the chance of an adverse decision in the Court of Appeal on the question whether there should not be a new trial, we see nothing either in the statute or the decided cases to prevent his doing so. The language of *Willes, J.*, in *Wheel-*

ton v. Hardisty, (8 E. & B. 285,) shews that there may be an appeal and also a matter of error heard at the same time, though the appeal is on matter not apparent on the record, and the error must appear on the face of the record. In that case the Court of Appeal permitted each party, by consent, to enter a suggestion of error on the record, though the appeal was from a decision of the court upon a rule obtained by the plaintiffs to enter a verdict for them on the issue on one plea, and for judgment *non obstante veredicto*, and also from the decision of the court on a rule obtained by defendants to enter a verdict for them on other pleas, and upon an equitable replication, or to arrest the judgment.

We are of opinion this rule must be discharged, and with costs, as it was moved with costs.

Rule discharged, with costs.

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### CHARLES BANTING V. ROBERT GUMMERSON.

#### *Will—Construction—Power of sale.*

B., by his will, bequeathed to his wife, A., the land in question, "to be at her disposal, if agreeable to the executors," of whom she was not one, "so long as she remains a widow," adding, "I wish and desire the aforementioned farm to be sold for the discharge of my lawful debts, and the residue accruing therefrom to be laid out in the payment or part payment of another for the support of my family." He then directed that his two eldest sons should have the property when they came of age, after his wife's death, if she should remain a widow, and if she should marry they were to come into possession when of age, and that these two sons were to pay to the other children a proportion equal to their part of the property, adding, "all the above to be done to the wishes of the aforementioned executors."

None of the executors proved or acted, and in 1851 letters of administration, with the will annexed, were granted to the widow, who in the same year conveyed to defendant, describing herself in the deed as "sole devisee (with power of sale for purposes set forth) under the will of" &c. She married again about 1853. This sale she swore was made in order to pay the testator's debts, and the purchase money so applied.

*Held*, that the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the executors: that she did not take it as administratrix: that on her marriage her own interest was at an end; and that the sons could, therefore, eject defendant without any notice to quit or demand of possession.

EJECTMENT for the north-west quarter of lot No. 21, in the 7th concession of Tecumseth, containing fifty acres. Defence for the whole.

The claimant's notice of title was by descent, as the eldest son and heir at-law of his father, James Banting; also, (by judge's order,) as devisee under the will of his said father, and under a deed of grant and quit-claim to him from his brother, Robert Thompson Banting, the other devisee under the same will.

The defendant's notice of title was under a deed from Anne Banting to Robert Gummerson, dated 25th April, 1851.

The trial took place at the fall assizes, 1864, for York and Peel, before *Adam Wilson*, J.

The land in question was granted in fee by the Crown to the Canada Company, on the 18th of July, 1831, by letters patent of that date.

A conveyance in fee, dated the 11th of January, 1837, purporting to be executed by two attorneys of the Canada Company, and sealed with the seal of the attorneys, conveying the north half of this lot to John Bell, was put in as *prima facie* proof; and Mr. Bell swore that he purchased from the Canada Company, and that he executed a deed shewn to him, dated the 17th of June, 1845, by which he conveyed the same land to James Banting, the plaintiff's father, in fee.

James Banting died on the 7th of April, 1848. The plaintiff was his eldest son. He had a brother, a son of the same parents, named Robert Thompson Banting, who was, according to the testimony of his uncle, Robert G. Banting, about twenty-two years old at the time of the trial, and was born, according to the same witness, in 1851 or 1852. His mother was also examined as a witness, and stated that he was more than twenty-one years old on the 27th of April, 1864, when he conveyed to the plaintiff.

James Banting left a will, dated the 3rd of April, 1848, the material part of which was as follows:—"I will and bequeath to my wife, Ann Banting, my farm, being the north half of lot 21, in the 7th concession of Tecumseth, with all the appurtenances thereto belonging, that is to say, all my stock and chattels, to be at her disposal, if agreeable to the executors, which are Thomas Banting, Benjamin



Banting, and Robert Banting, my brothers, so long as she remains a widow. I wish and desire the aforementioned farm to be sold for the discharge of my lawful debts, and the residue accruing therefrom to be laid out in the payment or part payment of another for the support of my family, the deed to be taken out in the name of my wife, Ann Banting, and subject to the same provisions as above mentioned, that is to say, so long as she remains my widow, and provided she may think right to marry, she is to have her thirds, as by law allowed. I wish and desire my two eldest sons to have the property when they come of lawful age, share and share alike, after my wife's death, provided she remains a widow, in accordance with the aforementioned part of this will; and provided she does marry, to come into possession when they are of lawful age. And I further command that my two eldest sons shall pay to the other children a proportion equal to their part of the property left by me, after the payment of my lawful debts, as each and all of them may come to a lawful age. All the above to be done to the wishes of the afore-mentioned executors."

Charles, the plaintiff, and his brother, Robert, were the two eldest sons of the testator. Neither of the three executors named in the will either proved it or took any part in administering the estate; and on the 18th of March, 1851, letters of administration, with the will annexed, were granted to his widow, Ann Banting.

On the 25th of April, 1851, by indenture of that date, Ann Banting, described therein as widow, "sole devisee (with power of sale for purposes set forth) under the will of James Banting, late of," &c., in consideration of £100, gave, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed unto the defendant, therein called Robert Gumberson, the premises in question in this suit, *habendum* in fee, with the usual covenants for seisin, right to convey without reservation, limitation, proviso or condition, right to sell, quiet enjoyment, and for further assurance. This deed was duly registered on the 26th day of April 1851.

Neither of the executors named in the will were consulted about this sale, or gave any authority for or consent to it.

The widow married again, more than 11 years before the trial. She stated that she sold the land to pay the debts of her late husband, Banting, which she had no other way of paying, and received \$600 from the defendant, who moved at once on to the place, and had improved upon it. No part of the \$600 was applied to the purchase of other land; the money was exhausted in the payment of debts.

On the 27th of April, 1864, Robert Banting, by deed of that date, conveyed to his brother, the plaintiff, in fee, all his interest in the premises in question.

The defendant's counsel objected, 1. That the deed executed by the attorneys of the Canada Company was not a deed purporting to be made by the Canada Company, or in their name, nor was it executed under the corporate seal, or under the official seal of the Canada Company, according to the statute of 1864, ch. 100; 2. That there was no demand of possession shewn.

The learned judge overruled the first objection absolutely, and also over-ruled the second, reserving leave to defendant to move to enter a verdict or nonsuit, if the court should hold that a demand was necessary.

The defendant's counsel further objected that the deed of the 27th of April, 1864, passed no estate upon which an action could be brought, because neither of the parties were in possession, and because it professed to pass only the estate, and not the land.

The learned judge ruled that the will did not enable the testator's widow to sell the land without the wish of the executors, and that such sale must be treated as invalid: that as the widow had married again, the plaintiff, as devisee of one-half and as the purchaser of his brother Robert's share, was entitled to recover, but that he could not recover this share unless Robert was of the full age of twenty-one years when he executed the deed—the questions as to demand of possession, the construction of the will, and other legal questions, to be disposed of by this court.

The jury found for the plaintiff, saying that Robert was of age when he made the deed to his brother.

In Michaelmas Term *McMichael* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for defendant, or a nonsuit, pursuant to leave reserved; or why a new trial should not be granted, the verdict being contrary to law and evidence, and for misdirection, in not telling the jury that the deed given by Mrs. Banting to the defendant was sufficient to pass the estate, and that there was no demand of possession, and no evidence of a proper execution of the conveyance from the Canada Company.

*Ferguson* shewed cause.

The authorities cited are referred to in the judgment.

DRAPER, C. J.—During the argument the objection as to the deed from the Canada Company was virtually disposed of by reference to the Imperial Statute, 9 Geo. IV., ch. 51, sec. 1, and to our statute 27 & 28 Vic., ch. 100. (a)

The second objection taken at the trial was the want of notice to quit or demand of possession before bringing this action, and this objection was reserved, while the former one was overruled.

At the date of the conveyance made by Anne Banting (25th April, 1851) all her children were minors. She could not, therefore, in making that sale, be considered as the authorized agent of her two sons, Charles and Robert, assuming that on a proper construction of the will she was tenant either for life or during widowhood, and that they were entitled to the remainder in fee on the determination of her estate, which took place in or about 1853. The defendant then by deed from her took no more than her estate, and when that determined the two sons could maintain ejectment against him without previous notice to quit or demand of possession. (*Doe v. Roberts*, 16 M. & W. 778.) This is always waiving the question which next arises, as to what is the proper effect and construction of the will.

Taking the whole will together, the utmost estate and

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(a) See *Fell v. South*, ante p. 196.



interest given to the testator's wife is an estate for life, subject to sooner determination on her marrying again, when the devise over to his sons would take effect, they entering into possession on coming of age; and if no other disposition of his farm was made, this would prevail and take effect. But this disposition is controlled by and subject to the following words: "I wish and desire the afore-mentioned farm to be sold for the discharge of my lawful debts." And the testator anticipated a surplus after his debts were paid, and directs it to be invested in the purchase of another farm, the deed of which is to be taken "in the name of my wife, Ann Banting," subject to the provisions above-mentioned, so long as she remains my widow. The direction to sell is explicit, but no person is named to carry it into effect.

In *Chance on Powers* (sec. 173) it is remarked, "It seems clear, speaking generally, that where the moneys arising from the sale are to be applied in the payment of the testator's debts, or funeral and testamentary expenses, a power of sale will be implied in the executors, it being their office to discharge the debts and these expenses." And he refers to a case in *Keilway*, 43 *b*, where A. seised in fee of certain land, enfeoffed B. and C. to the use of the feoffor and his heirs, and by his last will directed that B. and C. should sell this land for the payment of his debts. Afterwards B. and C. enfeoffed other persons for the performance of the will of A., and died. The second feoffees sold the land to a stranger, and the question was if this sale was good. It was held not to be so, and on the ground that the testator's authority was to B. and C., and they could not transfer the power, but must execute it themselves. It was argued that if a man makes his will, that his lands which are in the hands of his feoffees shall be sold for the payment of his debts, without naming the persons to make the sale, and dies, and if he names executors, they shall make the sale, because they represent the estate of the testator; and the court appear to have adopted this conclusion. Later cases establish the rule. See *Barrington v. Attorney-General*, (*Hardres* 419,) *Blatch v. Wilder*, (1 *Atk.* 420,) *Newton v.*

Bennet, (1 Br. C. C. 135,) Mackintosh v. Barber, (1 Bing. 50); and after referring to them it would appear that, as a general rule, the point is not open to question.

The present case falls within the rule. The wish and desire for the sale are equivalent to a direction. The wife is not directed to make it, nor is the fee given to her so that she could convey it to a purchaser, while the expressed object of the sale is for the payment of the testator's debts. The power of sale, therefore, is given by necessary implication to the executors, not being expressly given to any one.

But the executors have not taken probate. It does not appear from the evidence given at the trial that there was any formal act of renunciation, though in the letters of administration to the widow, which were put in, it is set forth that the executors duly renounced all right and title to probate of the will. Assuming that they did, it would not transfer the power given to the three persons named in the will as executors to any other person, nor enable another person to convey the estate in execution of the power. Nevertheless, by the deed of the 25th of April, 1851, Ann Banting, the widow, describing herself as sole devisee, with power of sale for purposes set forth, under the will of James Banting, professes to convey this land to the defendant; and the substantial question is, did the estate pass by that conveyance? I think it did not. Mrs. Banting was not sole devisee, and could convey no fee simple in that character. She had no power of sale given expressly by the will, and if she had any implied power as administratrix, she does not profess to convey in the execution of that power. And further, if she had so professed to convey, she had no such power by implication, arising from the language of the will, from the executors' renunciation, and from the administration, with the will annexed, granted to her. Mr. Chance (sec. 621) treats it as settled, "that under a direction or power to executors to sell, if no executor be appointed or will act, the ordinary or administrator cannot sell,"—citing Goodcheap's case, 49 Edw. III., fo. 16, and Bro. "Devise," pl. 10. See also Bro. "Executors," pl. 3, and

"Test." pl. 1, 19 H. VIII., fo. 9 *a*, pl. 4, shewing that where a testator directed land to be sold by his executors, one of whom died, and then the other, after making a will and appointing executors, died also, and the last-named executors sold the first testator's land, the sale was void. I refer also to *Mansell v. Mansell*, (*Wilmot's Opinions*, 36,) and to the very late case of *Robson v. Flight* (11 Jur. N. S. 147.)

I am of opinion this rule must be discharged.

HAGARTY, J.—All the beneficial interest of testator's widow in the land was a life estate, defeasible on her marrying a second time. Three executors are named, she not being amongst the number. There is no devise of the land for sale, nor express power to any named persons to sell. Whoever, therefore, could sell the land in fee simple, could only do so under the power, and not as having any interest. *Sugden on Powers*, ed. 1861, p. 114.

Here the testator directs that his land be sold to pay his debts. As the executors would have the distribution of the fund, they have the power by implication.—*Ib.* p. 115. The concluding words, "all the above to be done to the wishes of the afore-mentioned executors," seem to point to a personal trust by testator in the three persons named. Lord *St. Leonards* says on this point, "Where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive." *Ib.* 128.

If the widow had been one of the executors named, and the others (as here) had renounced, the statute 21 H. VIII., ch. 4, provides that when lands are willed to be sold by executors, and part of them refuse, &c., all sales by the executors that accept the administration shall be as valid as if all the executors had joined; and a sale by her might be supported.

But she never had the position of executor, and the grant of administration did not create, as between her and testator, any link of personal confidence, which is said to exist in the executor of an executor, to whom, as such, special power or confidence is given.

The strongest way of putting it for her would be, that as



the land was to be sold to pay debts, the fund produced by the sale would be distributable by her, and therefore she could sell. But I do not think the position tenable. Lord *St. Leonards* says, "It appears, therefore, to be settled that a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him either for the payment of debts or legacies; and it seems that whilst the chain remains unbroken the power, until exercised, will go from him to his executors;" and he adds that "where the power is given to executors, they may exercise it, although they renounce probate of the will." Sugden on Powers, 118.

In Chance on Powers (sec. 621) it is said, "Under a direction or power to executors to sell, if no executor be appointed or will act, the ordinary or administrator cannot sell." He refers to a case in the appendix to Lord *St. Leonards'* work. This I find in the edition of the latter of 1861, in the appendix, p. 893, as of page 49, as a case in the reign of Henry VII.: "If a man has feoffees in his land, and makes his will that his executors shall sell his land, and then he does not make executors, then the ordinary shall not meddle with the land nor the administrator neither, for the ordinary has only to meddle with testamentary matters, as of goods, and consequently no more can the administrator, who is but his deputy. \* \* And if a man make his will that his executors shall alien his land, without naming their proper names, if they refuse the administration, and to be executors, yet they may alien the land. \* \* If a man make a will of his lands, that his executors shall sell the land, and alien, &c., if the executors renounce administration and to be executors, then neither the administrators nor the ordinary can sell or alien. *Quod fuit concessum.*"

The deed executed to defendant by Mrs. Banting therefore passed nothing beyond her own interest, which was defeasible by her second marriage, an event that happened before action brought.

MORRISON, J., concurred.

Rule discharged.(a)

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(a) See an American case, *Smith v. Jones*, in 1 U. C. L. J. 92, N. S.

## PATERSON v. TODD.

*Sale of lands under execution—Ejectment on sheriff's deed—Defects in the advertisement—Effect of—Proof of judgment.*

Errors or defects in the advertisements, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title, even if he be one of the execution creditors.

In ejectment upon a sheriff's deed for land sold on execution, it appeared that the sale had been duly advertised in a local paper for three months before the 27th of August, 1864; and that an advertisement incorrect in some particulars had been inserted in the *Gazette* of the 11th of June, 1864, and four next numbers, the errors being corrected in the sixth insertion—all these advertisements being of a sale on the 27th of August. On the 1st of October following, and in the five next numbers, the sale was advertised in the *Gazette* for the 12th of November, not as a postponement of the previous sale; but this was not published in a local paper, and though notice of it was put up on the door of the court-house, it was not shewn to have been continued there for three months. *Held*, that these advertisements could not be considered a compliance with the statute, C. S. U. C., ch. 22, sec. 267, but that the defects would not affect the purchaser's title.

Judgments may be proved at *Nisi Prius* by producing the original roll as well as by exemplification, but the clerk should not produce such roll without proper authority.

EJECTMENT for part of park lot number 8, being the north half of lot numbered and laid down on the plan of the said park lot number 8 and park lot number 7, made by D. P. S. Robert Lynn as lot number 59 on the east of Victoria street, in the city of Toronto, described by metes and bounds. Defence for the whole.

The claimant gave notice of title under a deed of sale to himself from the sheriff of York and Peel, made by virtue of certain writs of execution against the lands of the defendant, and under a deed of confirmation made by the sheriff and indorsed thereon.

The defendant gave notice of title under a deed from James S. Murray.

The trial took place at the assizes for York and Peel, in January, 1865, before *Hagarty, J.*

The deputy sheriff was called as a witness, and produced executions against the lands of the defendant in three suits, and stated that the lands in question were sold on these writs, and that the plaintiff was the purchaser. He proved the execution of a deed dated 22nd November, 1864, reciting a writ of *fi. fa.* dated 2nd March, 1863, and renewed for one year from the 1st of March, 1864, at the suit of Henry

Abraham Joseph against the lands of the defendant ; reciting also a writ of *fi. fa.* received by him on the 16th of March, 1863, at the suit of James Paterson and Robert A. Harrison against the lands of the defendant ; and reciting also a third writ of *fi. fa.*, dated 16th of March, 1863, and renewed for one year from the 3rd of March, 1864, at the suit of William Wakefield and Frederick William Coate against the lands of the defendant—under which writs he seized, &c., and advertised, &c., and returned to the writ of Henry Abraham Joseph that he had seized, &c., but the lands remained on hand for want of buyers ; and reciting a writ of *ven. ex.* to sell those lands ; and that on the 12th of November, 1864, the sheriff exposed for sale the land now in question under the writ of *ven. ex.* and the writs of *fi. fa.*, and that the plaintiff became the purchaser ; and did by such deed sell to the plaintiff in fee all the right, title and interest of the defendant in the same lands.

The deputy sheriff proved also a deed of confirmation indorsed upon the foregoing deed, and dated the 3rd December, 1864, executed by the sheriff, which last deed was executed to correct an inaccuracy in the description contained in the first.

He produced an advertisement, which was first inserted in the *Canada Gazette* on the 11th of June, 1864, stating, “ To be sold by public auction, all the right, title and interest of Robert Money Todd, in and to the north half of lot No. 59, on the east side of Victoria street, in the city of Toronto, as laid out on a plan by Robert F. Lynn, P. L. S., of Park lots 7 and 8” (setting forth the abutments) “ under several writs of *feri facias*.”

“ Henry Abraham Joseph, plaintiff, v. Robert Money Todd, defendant. James Patterson and Robert A. Harrison, plaintiffs, v. Robert Money Todd, defendant. William Wakefield and Frederick William Coate, plaintiffs, v. Robert Money Todd, defendant. At twelve o'clock, noon, on Saturday, the twenty-seventh day of August, A.D., 1864, at the sheriff's office, in the court house, city of Toronto.”

In the *Gazette* of the 16th July, 1864, the error in spelling Todd's name was corrected, the previous five insertions



having been as above set out. The advertisement was correctly inserted in the *Leader* newspaper for three months, beginning in May, 1864. The corrected advertisement was, (beginning on the 1st of October,) six times inserted in the *Gazette*, but the day of sale named therein was the 12th of November, and of this day there was no advertisement in the *Leader*; but in the *Gazette* only the day of sale was changed, and it appeared there not as a postponement, but as a new advertisement. The sale was made as a sale adjourned from the 27th of August, and a correct notice of it was put up on the usual board at the door of the court house, where all these sales are advertised.

The plaintiff's case was then closed, but on its being objected that the judgments on which these executions were founded were not proved, the learned judge allowed this defect to be supplied. The plaintiff then called a clerk in the office of the clerk of the County Court, who produced the original rolls from the County Court in these three suits.

The defendant's counsel objected, that the advertisements were irregular: that the time of sale must be advertised in the *Gazette* for six consecutive weeks, and in the local paper for three months, and that the advertisement in the local paper and that in the *Gazette* were quite different. He objected also to the mode in which the judgments were proved.

Leave being reserved to the defendant to move for a nonsuit on these objections, the plaintiff had a verdict.

*McMichael* obtained a rule on the leave reserved, or for a new trial, on the law and evidence, and for misdirection, in this, that the plaintiff claimed under a sheriff's deed which was not valid, there having been no legal advertisement of the day of sale, or of the parties to the suit in which the sale was made, or of the sale itself, and so the sale was vitiated; and that the judgment was not properly proved—that being from another court, it could only be proved by exemplification. He cited *Doe Miller v. Tiffany*, 5 U. C. R. 88.

*Robert A. Harrison* shewed cause, citing *Roe v. McNeill*,

13 C. P. 191, 192; *The Maria das Doras*, 7 L. T. Rep. N. S. 838; *Vindin v. Wallis*, ante p. 9; *Douglass v. Bradford*, 3 C. P. 459; *Jarvis v. Brooke*, 11 U. C. R. 299.

DRAPER, C. J.—I think it impossible to say that the notices of sale comply with the Consol. Stat. U. C., ch. 22, sec. 267, which requires an advertisement of sale in the *Canada Gazette* at least six times, specifying: 1. The particular property to be sold. 2. The names of the plaintiff and defendant. 3. The time and place of the intended sale; and that such advertisement shall also be published in a public newspaper of the county in which the lands lie, or that for three months a notice of such sale shall be put up and continued in the office of the clerk of the peace, or on the door of the court house or place in which the Court of General Quarter Sessions of the Peace for such county is usually holden; but nothing in the act contained shall be taken to prevent an adjournment of the sale to a future day.

Now, what are the facts? An advertisement, to the correctness of which no objection has been pointed out, was inserted in a local newspaper for three months before the 27th of August, 1864. A notice, incorrect in some particulars, was also inserted in the *Canada Gazette* on the 11th of June, 1864, and in the four next ensuing weekly numbers of the *Gazette*. In the sixth insertion the errors were corrected, all six announcing the sale for the 27th of August, 1864. Then, on the 1st of October following, another notice was inserted in the *Gazette* for the sale of the lands on the 12th of November, 1864, and this is published in the five succeeding weekly numbers. It does not purport to be a postponement of the sale formerly advertised. But there was no advertisement for the 12th of November in a local newspaper, and though there was evidence that this new notice was put up at the door of the court house, it is not shewn to have been continued there for three months next preceding the sale, which I take the statute to require when there is no local advertisement.

It becomes therefore necessary to enquire whether the validity of the sale is dependent on a strict compliance with the statutory requirements as to advertising.

In *Jarvis v. Brooke* (11 U. C. R. 299) *Robinson, C. J.*, observed, in effect, that upon general principles a defect or informality in regard to the notice of sale ought not to affect the validity of the sale, but should be treated merely as a direction of the statute which the sheriff is to observe at his peril, being subject to an action at the suit of the party injured if he neglects his duty in this respect; adding, "We have decided this on the principles of the common law where lands have been sold in execution." That case related to a sale for taxes. The same opinion is virtually expressed in *Jarvis v. Cayley*, at p. 289 of the same volume. "A failure to give due notice would not necessarily affect the validity of the sale." \* \* \* "Irregularity of that kind would only be an objection in the mouth of the proprietor whose land was sold, or perhaps on the part of the public who were interested in having the sale duly advertised." This case was also on a sale for taxes. The cases of *Williams v. Taylor*, (13 C. P. 219,) and *Hall v. Hill*, (22 U. C. R. 578,)(a) were also upon sales for taxes.

Those decisions rest upon grounds and considerations very different from such as exist in regard to sales upon execution. The language used in *Doe v. Reaumore*, (3 O. S. 247,) does not apply to the latter class of sales. There is no forfeiture nor accumulated penalty for alleged default. It is the compelling payment out of a debtor's property of money due to his creditor, a course equally sanctioned by the principles of the common law and by statute. The substantial matter is the recovery of the judgment and the issuing of the proper writ to the proper officer to make the money adjudged to the plaintiff. In reference to the writ there are certain statutory provisions, the language of which is unmistakably imperative, for instance "Goods and chattels, lands and tenements shall not be included in the same writ of execution, nor shall any execution issue against lands and tenements until the return of an execution against goods and chattels; nor shall the sheriff expose the land to sale within less than twelve months from the day on which

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(a) This case has since been affirmed in the Court of Appeal.



the writ is delivered to him," (Consol. Stat. U. C. ch. 22, sec. 252.) The two former of these commands involve matters wholly within the power or control of the plaintiff or his attorney, and the third not much less so, for they must know the earliest day at which a sale can legally take place, and can give proper directions, which the sheriff must follow upon peril of the consequences of non-observance. But the language is less stringent with regard to advertisements—namely, "Before the sale \* \* the sheriff shall publish." It is a positive command to him, but it is not, as in the preceding case, a positive direction as to the writ, or a positive prohibition to its execution until a stated event has happened, for it is not said there shall be no sale until or unless the sheriff has advertised. I do not question that it may be irregular to proceed to sell without giving proper notice, but the defendant here contends that the sale so made is wholly void.

In determining this question (upon which we have found no direct decision in our own courts) we are bound to remember that ever since the Stat. 2 Geo. IV. ch. 1, sales of land have been required to be advertised in this manner, and that for upwards of forty years titles and interests in land have been sold by sheriffs in professed obedience to the law. It is in the highest degree probable that in numerous instances during all these years irregularities, errors or omissions have occurred in the advertisements, and yet, so far as we are informed, there is no decision that a sheriff's sale under execution of land is invalid by reason of erroneous or defective advertisements in the *Gazette* or the local newspaper; and the language of the Chief Justice in *Jarvis v. Brooke* shews that there have been decisions (though unreported) the other way, where lands have been sold in execution. And though we might think that the purchaser could have little reason to complain where he was one of the execution creditors and also the attorney on record, if the proceedings were held nugatory by reason of any irregularity or omission in advertising, we think this no reason for incurring the risk of shaking other titles where the purchaser has had no such necessity or opportunity for

watching the proceedings. We think we ought not, by a decision given for the first time after so many years, to deter purchasers at sheriff's sales by holding it to be their duty to examine into every step of the sheriff's proceedings under a valid writ supported by a valid judgment. We should in fact be inflicting an injury on the debtor whose lands are offered for sale.

The only other point is the sufficiency of the proof of the judgment. Conceding fully that the clerk who produced the original rolls acted improperly and deserves censure, unless he was authorized by higher authority, I do not understand upon what principle the exemplification of a judgment is better proof of the existence of the judgment, than the original roll would be. No doubt has been raised as to the genuineness of the roll produced at *nisi prius*. The reason why exemplifications and examined copies of records were always admitted in evidence is thus stated by Chief Baron Gilbert, "Since you cannot have the original, the best evidence that can be had is a true copy; and the rule of evidence commands no farther than to produce the best that the nature of the thing is capable of." (Gilbert on Evidence, p. 6.) And in *Hennell v. Lyon*, (1 B. & Al. 182,) Lord *Ellenborough* says, "The admission of copies in evidence is founded upon a principle of public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable." Records also might be wanted to be put in proof at different places at the same time. For these or the like reasons copies of the records of Courts of Record, and even of courts not of record, being properly authenticated or proved, are admitted, but this does not prove that the originals are not evidence when they can be had, and the contrary is notoriously the law on the issue of noli record, when the record belongs to the court in which the issue is joined.

For these reasons I think the rule must be discharged.

HAGARTY, J.—I concur in holding the rule must be discharged. I think the general view of the profession for

a long series of years has been, that any informality or non-compliance with the letter of the statute as to the advertising will not vitiate a sheriff's sale on execution against lands, and that it never was the practice among conveyancers to institute any enquiry into the manner in which lands were advertised. It would be most unwise in my judgment to open such a wide field of enquiry into the validity of the innumerable titles to real estate sold in execution.

MORRISON, J., concurred.

Rule discharged.(a)

### MICHIE ET AL. V. REYNOLDS, SHERIFF, ET AL.

*Action against sheriff for not paying over moneys levied—Exemption Acts, 23 Vic., ch. 25, 24 Vic., ch. 27—Poundage—Costs of rule to return—Interest—Sheriff's charges.*

In an action against the sheriff and his sureties for not paying over moneys levied under a *fi. fa.*, it appeared that certain goods of one H. had been seized by the sheriff at the plaintiffs' suit, and claimed by the debtor's brother, under a sale which the plaintiffs alleged to be fraudulent. The debtor also claimed exemption for \$60 worth, under the 23 Vic., ch. 25, and these latter goods the sheriff sold under a subsequent execution, the debt for which that judgment was recovered having been contracted before the 19th of May, 1860, as appeared by an exemplification of the judgment. The plaintiffs alleged that these goods were not subject to that writ, there being no certificate indorsed upon it under 24 Vic., ch. 27, sec. 2.

*Held*, that the plaintiffs could have no claim on account of such goods or their proceeds, for they were exempt from their writ under 23 Vic., ch. 25, and even if not subject to the other execution, the sheriff was responsible to the execution debtor, not to the plaintiffs, for the proceeds.

*Semble*, however, that the want of the certificate was immaterial, as the statute does not make it the only mode of proving when the debt was contracted, and here that was shewn by the exemplification.

*Held*, 1. That the sheriff is entitled to poundage only on the sum paid over by him, not on what he retains for himself.

2. That the costs of a rule to return the writ could not be recovered in this action, and that the expense of a messenger sent to the sheriff to demand the money which he had returned as on hand could not be allowed.

3. The court being left to decide as a jury, allowed interest to the plaintiffs on money levied and improperly withheld by the sheriff.

4. And they expressed great surprise at finding that on a sale of goods producing in gross \$846, the expenses amounted to \$106, believing that such a charge would not be found justified by the tariff and the proper practice under it.

The bill of disbursements charged by the sheriff was referred to the Master, to tax what in his discretion was necessarily incurred in the care and removal of the goods.

THE DECLARATION was founded on the covenant entered into by sheriff Reynolds and his sureties, dated the 10th of

(a) See *Osborne et al. v. Kerr*, 17 U. C. R. 134, 141-2.



December, 1862, that the sheriff should pay over to the persons entitled to the same all moneys which he should receive by virtue of his office from the date of the covenant, and that neither the sheriff nor his deputy should from that date wilfully misconduct himself in his office, to the damage of any person being a party in any legal proceeding.

*Averment.*—That after that date, and while Reynolds was sheriff, on the 21st of June, 1864, a *fi. fa.* against goods of one Hay, in the sheriff's county, at the suit of the plaintiffs, was duly sued out, indorsed to levy \$794·73 debt, and \$16·95 costs, with interest, and \$5 for writ, and was on the 22nd of June, 1864, placed in the sheriff's hands to be executed: that afterwards, and while, &c., on the 1st of August, 1864, the sheriff received for the use of the plaintiffs \$740·6, part of the moneys indorsed to be levied, besides his fees, poundages and incidental expenses: that the plaintiffs were entitled to these moneys, and demanded them of the sheriff: that although the sheriff had paid a small portion, yet he had refused, and still doth neglect and refuse to pay the residue to the plaintiffs, and hath converted the same to his own use. Special damage was alleged, in the cost of procuring a rule to return the writ, and causing a demand to be made of payment. *Second breach.*—For not paying over the moneys levied, and for falsely returning that he had made of the goods of Hay \$680·6, and that Hay had no more goods whereof, &c.

*Pleas.*—1. That the sheriff did not receive by virtue of his office, and for the use of the plaintiffs, the money in the first breach mentioned.

2. To the first breach, that the sheriff before action paid to the plaintiffs the amount levied and received by him for the use of the plaintiffs under the writ.

3. To the second breach, that the sheriff under such writ did not levy nor receive for the use of the plaintiffs the money therein mentioned.

The case was tried at the assizes for York and Peel in January, 1865, before *John Wilson, J.*

It appeared that on the 22nd of June, 1864, an execution against the goods of one Hay, at the suit of the plaintiffs,

was delivered to the sheriff, indorsed to levy \$794.73 debt, \$16.95 costs, \$5 for writ, and sheriff's fees. On the 24th of June the sheriff wrote to the plaintiffs' attorneys, that Hay stated that he had sold out his stock to his brother about six weeks before, and that the brother was carrying on the business, and requesting instructions what goods should be seized. A reply was given on the 27th of June, that the plaintiffs thought the alleged sale was colorable, and that if a claim was made to the goods when seized there had better be an interpleader. On the 1st of July the sheriff wrote informing the plaintiffs' attorneys of the day for which he had advertised the sale. On the 16th of July the plaintiffs' attorneys wrote to the sheriff, hoping he had realized the full amount of the plaintiffs' execution, adding, "If not, we object to your applying \$60 worth of the goods in the store to Tincombe's (subsequent) execution, because, although it is true the disposition of the goods by Hay to his brother was void as to our execution, yet W. O. Hay," (the execution debtor, "was not in occupation of the store personally, and he is not in a position to claim any exemption as to the store goods; but even were that otherwise, the goods are now reduced to money, as to which there is clearly no exemption, and Michie's execution being still in your hands, and being the first one, the money must be applied on it." On the 25th of July the sheriff wrote to the plaintiffs' attorneys apologizing for delay, but excusing it, and regretting a chance of difficulty about exempted goods.

On the 22nd of September 1864, the Sheriff was served with a rule to return the writ, and on the 28th of September he returned that he had made \$680.06, which he had ready, and that Hay had no more goods and chattels. On the 25th of October following he paid over \$310.15, and on the 24th of November \$100, and on the 1st of December this action was brought. The sheriff requested the plaintiffs' attorneys to draw on him, but they declined unless he paid the expenses, and requested him to remit the money at his own risk. They were willing to take the money and leave the question as to the \$60 open. The gross amount produced at the sheriff's sale was \$846.40. The execution debtor's

brother, R. D. Hay, was then in possession by a son of his, a young man about eighteen years old.

On the last day of the sale the execution debtor was present, and claimed to have \$60 worth exempted, and pointed out scales, a show case, and other articles useful in a grocer's business. The sheriff sold these things as liable under Tincombe's execution, because the debt for which judgment was recovered was contracted before the 19th of May, 1860. (See 23 Vic., ch. 25.) They brought \$60. This witness was employed as an agent to attend the sale for the plaintiffs, and protested against the selling under Tincombe's execution. There was abundant proof that the execution debtor asserted that he had sold these goods to his brother. The plaintiffs' attorney sent a special messenger to the sheriff on the 17th of October to get the money. He could not find the sheriff, but saw his deputy, who said he could not pay. He said the money had been made, though there had been delay. The sheriff was away. The expenses of this messenger were \$3.40.

On the defence it was denied that Nourse, the person who was spoken to on the 17th of October, was deputy sheriff. He swore he was managing clerk, and returned writs, wrote letters, &c.: that the sheriff had no deputy, but he (Nourse) was chief in the office: that Tincombe's execution, which was from the County Court, was received on the 28th of June, 1864. He proved that one Wilcox superintended the sale: he and one Fairbanks conducted it, and two of Wilcox's sons assisted: that L. H. Schofield took stock eleven or twelve days, and was in possession, and was at the sale. The poundage was charged on the gross amount of the sale. The plaintiffs' attorney had by letter of the 8th of October, 1864, insisted the money should be paid in Toronto free of expense by the plaintiffs, but they offered to draw if the sheriff would consent to their paying the bank charge. They claimed the costs of ruling the sheriff, and they sent him a bond of indemnity against the claim of R. O. Hay.

The sheriff rendered a "Memorandum of Disbursements" for this sale, &c.



Paid J. S. M. Wilcox, for assistance at sale, 8 days at \$2	\$16.00
“ Hagard Wilcox, “ “ 2 “ 1	2.00
“ Marshall Wilcox, “ “ 4 “ 1	4.00
“ For putting up canvas, and preparing for sale.....	1.50
“ Book, pencil and paper, 5c., nails 3c., paid boy 10c.	18
“ L. H. Schofield, for assistance 20 days, at \$2....	40.00
Amount of goods charged and re-sold .....	97

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\$64.65

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The sheriff also charged for his own fees,

Receiving writ 25c., warrant thereon 50c., levy 75c...\$	1.50
Schedule \$6, advertising \$3, mileage 80cts.....	9.80
Poundage .....	29.65
Return of writ.....	50

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\$41.45

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The learned judge held that the goods sold under Tincombe's execution were such as were exempted from sale under the plaintiffs' execution under the 23 Vic., ch. 25, but that under the 24 Vic., ch. 27, they were liable to be sold under Tincombe's execution; and that the plaintiffs, who denied that Hay's brother had any claim to the goods, could not defeat Mrs. Tincombe's right by asserting that the transfer to Hay's brother had any operation.

He also held that the sheriff was only entitled to charge mileage for going to seize, to disbursements for advertising, and such as were necessarily incurred in the care and removal of the property, and that the poundage covered all the other expenses of sale: that he was not entitled to charge poundage on the gross amount of the sale.

The counsel then agreed that the court might draw inferences as a jury might do: that the damages should be assessed at \$269.91, with leave to the plaintiffs to move the court to increase the amount by any sums the sheriff had overcharged, also by the costs of the rule, the expenses of sending for the money, and the sum withheld from the Tincombe execution, and interest while the money was in the sheriff's hands, which last question the court were to deal with as a jury might do.

*Robert A. Harrison*, for the plaintiffs, obtained a rule *nisi* accordingly.

*McMichael* shewed cause, citing 23 Vic, ch. 25, sec. 4, sub-sec. 6; 24 Vic., ch. 27; *Shuter v. Leonard*, 3 O. S. 317.

*Robert A. Harrison* contra, cited Har. C. L. P. A. p. 714; C. L. P. A. secs. 275, 276, 342; Consol. Stat. C. ch. 80, sec. 6; *McGowan v. Gilchrist*, R. & H. Dig. 393; *Bank of Upper Canada v. McFarlane*, 4 U. C. R. 396.

DRAPER, C. J., delivered the judgment of the court.

1st. As to \$60 received by the sheriff for goods claimed by the execution debtor to be exempted from execution, but sold by the sheriff as liable under the Tincombe execution.

We are of opinion that the plaintiffs have no right to claim this sum. The question, properly speaking, lies neither between them and the sheriff, nor between them and their execution debtor, but between them and Mrs. Tincombe, under whose execution these particular goods were sold. These goods were exempted from sale under the plaintiffs' writ by the statute 23 Vic., ch. 25, but assuming for the moment that the case was sufficiently proved to be within the statute 24 Vic., ch. 27, (which is what the plaintiffs deny,) they were liable to sale under the Tincombe writ. If not so liable, then the sheriff was a tort-feasor in selling them at all, and so it seems the plaintiffs' counsel treats him, insisting that the money received for these goods belonged to the execution debtor, and as money was liable to be taken under the plaintiffs' execution.

We think this is going too far. If the sheriff was a wrongdoer in selling these goods, he is liable to Hay, not to the plaintiffs, for Hay had the right to them as against the plaintiffs, and according to the plaintiffs' contention as against the Tincombe execution also, because the judge's signature to the certificate indorsed on that execution, and required by the 2nd section of the 24 Vic., was not proved. Be it so; then suppose the sheriff, instead of selling the goods and upon some insufficient ground keeping the proceeds, had kept the goods and converted them to his own use, could the plaintiffs have claimed their value? The sheriff never set

apart or held these particular \$60 as belonging to the execution debtor, in any other way than as professing to hold them as moneys made for the plaintiff in the Tincombe execution.

Nor should it be overlooked that the exemplification of the judgment Tincomb v. Hay, which is before us, shews the debt was contracted before the 19th of May, 1860, nor that the proviso for the judge's certificate is introduced for the benefit of the creditor claiming against the exemption given by the preceding statute to the debtor. Hay, as the owner of the goods, might probably maintain an action against the sheriff for money had and received, or for the value of the goods themselves, if in truth there were no certificate, but we fail to discover how that helps the plaintiffs. We do not wish to be understood as deciding that the certificate must necessarily be proved in a case like the present. The non-exemption depends on the time when the debt was contracted, and that fact may be legally proved in other ways besides by the certificate, which is provided for as a convenient way of making the fact known to the sheriff, to whom it would seem the mere production of it would be a sufficient authority to sell the goods, without proof of its being signed by the judge.

The plaintiffs assert, and apparently are right, that the assignment of these goods by their debtor, Hay, to his brother, was fraudulent and void. The goods were therefore liable to their execution, but the statute 23 Vic., ch. 25, exempted certain of them, to the value of \$60, from such liability. Goods to that value were therefore withdrawn from this sale. The statute 24 Vic., ch. 27, sec. 2, limited this exception to debts contracted after the 19th of May, 1860. Hence, as the debt to the plaintiffs was contracted after that day, the exemption applied, though it did not apply to Tincombe's execution. The plaintiffs, therefore, have no claim to any part of these \$60.

2. As to the charges headed "Memorandum of Disbursements," we think it should be referred to the Master of this court to tax what in his discretion were necessary disbursements incurred in the care and removal of the goods,



and the sum so taxed should be allowed to the sheriff, and the difference between that sum and the \$64.65 charged should be added to the plaintiff's verdict.

3. We are of opinion the sheriff is entitled to poundage on the sum he makes and has to pay over, and not on that which he retains for himself. The sum of \$2.65 should therefore be added on this account to the verdict.

4. We have found no authority for charging against the sheriff and his sureties, in an action like the present, the costs of the rule to return a writ. No doubt the sheriff is liable to them under the provisions of Consol. Stat. U. C. ch. 22, sec. 278, but we apprehend they must be enforced by a different proceeding. Nor do we think we should allow the expenses of a messenger sent to the sheriff in order to demand the money which he returned he had on hand.

Lastly, if the question of interest had been left to the jury, we have no doubt they would have given it to the plaintiffs, considering that the sheriff had retained the proceeds of the executions so long. It has been the practice for a very long time to leave to the discretion of the jury to give interest where the payment of a just debt has been withheld, and we can find no good reason to depart from that practice on the present occasion.

We feel bound to express our great surprise at finding that on a sale of goods on execution, producing in gross \$846, there should be charged, as the expenses connected with the seizure and sale, a sum of \$106, an eighth part of the gross produce. If it shall turn out that the charges taxable according to law justify such a charge, it is time they were reduced, for they must lead to great oppression of unfortunate debtors. We firmly believe, however, that the fault will not be found in the existing tariff, and the authorized and proper practice under it.

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IN THE MATTER OF PARTITION BETWEEN JOHN KNOWLES,  
ET AL., AND ROBERT POST, ET AL.

*Partition—Power of the court to amend proceedings—C. S. U. C. ch. 86.*

A sale of lands having been ordered under the 17th section of the Partition Act, Consol. Stat. U. C. ch. 86, to be made by certain persons agreed upon by the parties, one of the persons named refused to act, and the petitioners then applied on this ground to rescind the order for sale, and for partition to be made by the Real Representative.

*Held*, that court could not interfere, not having any original or common law jurisdiction, and the case which had arisen not being provided for in the act.

*Quære*, whether, as the person refusing had consented to the order for sale, and apparently accepted the duty, his conduct might not have been regarded as a contempt, or at least have subjected him to all the costs of the proceedings which his refusal had rendered nugatory.

*Quære*, also, whether the order might not have been varied or rescinded by consent of all those who consented to its being made; or if one of those appointed to make the sale were to die or become incapable of acting, whether the court might not order the proceedings to be completed by those remaining.

This was an application to rescind an order for sale of the lands in question in this matter. The facts are fully stated in the judgment of the court, delivered by

DRAPER, C. J.—In Michaelmas Term, 1862, a rule was made in this matter, by which—on reading the petition filed, the appearance entered for the defendants by their guardians, the plea confessing the matters alleged in the petition, and the consent of the plaintiffs by their attorney, and of the defendants by their guardian, to a sale of the lands whereof a partition or sale is prayed by the petition, and the parties having agreed that such sale shall be made by Abraham Knowles, William Knowles Burk, and George Post—it was ordered that a sale of the said lands be made, as prayed by the said petition, by the said Abraham Knowles, William Knowles Burk, and George Post, and that the proceeds be paid into court.

In Easter Term, 1863, *Beaty*, on behalf of the petitioners, obtained a rule calling on the defendants to shew cause why the rule above stated should not be rescinded, and that the court should declare the rights, title, and interest of the parties in the estate, and that the partition should be made

according to such rights by the Real Representative for each county, respectively, and that judgment should be rendered herein according to the statute—on the ground that Abraham Knowles refused to act any further herein, and that others of the parties refused to agree to the appointment of any other person in his stead, and on grounds disclosed in the papers filed.

This was the state of the proceedings when I came into this court.

On Tuesday, the 1st of September, *John Bell*, Q. C., was heard against the rule. It was not supported. On Saturday, the 26th, the parties were informed that the court desired to hear a further argument. It was suggested to them that the conduct of Abraham Knowles, who was one of the parties consenting to the rule of Michaelmas Term, 1862, and apparently accepted the duty, and had now refused to do anything in performance of it, insisting that another mode of proceeding would be preferred by him, might call for the future consideration of the court, either as a contempt or at least as making it proper that he should pay all the costs of the proceedings which his refusal rendered nugatory.

Their attention was also called to the fact that the statute contained no provision for supplying the place of any individual named, whether solely or with others, to make a partition or sale, nor after a sale shall have been ordered by consent is there (in terms at all events) any authority given to the court to annul that order: that possibly, if those who consented to its being made also consented to its being varied or rescinded, the court might feel authorized to take such a course, or if one of those appointed to make partition or sale were to die or become incapable of acting, they might order that the proceedings should be completed by those who still remained. It was pointed out that the present rule neither asked for any redress as against Abraham Knowles, nor that the proceedings might go on without him; it would rather appear the rule was moved in order to give effect to his refusal to act, and to obtain indirectly the sanction of the court to it. The court therefore required the rule to be spoken to again.



On the 11th of February, 1864, *Bell*, Q. C., again opposed the rule, which was supported just as it was originally moved, by *C. S. Patterson* for the petitioners. Nothing was said as to any point but the authority of the court to rescind the former rule.

On inquiry for the papers after that term they were not forthcoming, nor have they been found until very recently. It was on the first day of this term (6th of February, 1865) that the court were told the papers were found.

Among them I find only three affidavits which were used on moving the rule. I may be mistaken as to whether any other affidavits or papers were then referred to, for neither the motion paper nor the rule state what were the affidavits, &c., on reading which the rule was asked for or granted.

One is from Abraham Knowles himself, stating that he refuses to act further in the matter, and desires the lands to be sold by the Real Representative in each county in which the lands are situate, and that he represents one-seventh interest in the whole property.

One is made by John Knowles and Richard Knowles, stating that they are informed that Abraham Knowles refuses to act any further, and they express a desire to have the lands sold in the usual manner by the Real Representative: that they represent two-sevenths of the property. They are two of the petitioners.

The third affidavit is made by William Knowles Burk, and George William Post, the two persons joined with Abraham Knowles in the rule of Michaelmas Term, 1862, to sell the land. They say they desire to sell the land on credit, and state their scheme of sale, and believe it will be for the interest of all concerned that the lands should be sold at public auction to the highest bidder on the terms which they suggest: that such is the desire of most of the parties interested in number and extent of interest; and they desire the amendment of the rule of Michaelmas Term, 1862, so that it shall direct a sale on credit, as suggested in their affidavit, instead of its being a cash sale.

The court has no authority in this matter but that which

is set forth in the Consol. Stat. U. C., ch. 86. The case which has arisen has not been provided for. We have no original or common law jurisdiction. The parties have selected for themselves the course permitted by the 17th section of the act, and in so doing have withdrawn their case from us to a private tribunal of their own selection. We think we have no authority to interfere, and must refuse the rule.

Rule refused.

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### KEATING V. CASSELS.

*Will—Construction—Period of vesting—"Survivors."*

Testator, after devising certain land to his son George and his wife, and to the survivor of them, added, "After the decease of the said George Jacob and his said wife, I give, devise and bequeath the said lands (so devised to them) to the children of the said George Jacob and his wife, including Edmund Jacob, son of the said George by his first wife, to have and to hold the same to the said children of the said George Jacob, or the survivors of them, for ever, share and share alike." George Jacob and his wife left two children surviving them. Edmund died before the father. In ejectment by one child against a purchaser from the other,

*Held*, 1. That the remainder in fee vested upon the death of the last tenant for life, and that Edmund therefore took nothing.

2. That the two children took as tenants in common, and not as joint tenants, and that the plaintiff therefore was entitled only to one undivided moiety.

This was an action of ejectment, brought for land in the township of Raleigh. The defendant admitted the plaintiff's right to an undivided moiety, and claimed title as tenant in common with the plaintiff of the other undivided moiety. A special case was duly settled for the judgment of the court, as follows, in substance:—

On the 20th of December, 1833, George Jacob made his last will, executed in due form to pass real estate, which will was duly registered. He thereby, among other things, devised as follows:

"6thly. I give, devise and bequeath unto my son George Jacob, and to his wife Eleanor, and to the survivor of them," (the premises in dispute) "to have and to hold the said tracts of land above mentioned to the said George Jacob and his said wife, or the survivor of them, during their natural life or lives."

"7thly. That after the decease of the said George Jacob and his said wife, I give, devise and bequeath the said lands (so devised to them) to the children of the said George Jacob and his wife, including Edmund Jacob, son of said George by his first wife, to have and to hold the same to the said children of the said George Jacob, or the survivor of them, for ever, share and share alike."

The testator died on the 3rd of February, 1834.

George Jacob, the son, and his wife Eleanor, had two children, George and Mary, the present plaintiff, who married Thomas Keating before the death of either of her parents.

Edmund Jacob survived the testator, but died without issue before his father.

George Jacob, the testator's son, died on the 2nd of October, 1856, and Eleanor, the son's wife, died on the 30th of January, 1861.

George Jacob, the testator's grandson, died on the 11th of May, 1864, leaving issue him surviving.

Thomas Keating, the plaintiff's husband, died on the 27th of September, 1864.

By virtue of a writ of execution issued out of this court, tested 23rd September, 1854, directed and delivered to the sheriff of Kent, against the lands of George Jacob, the testator's grandson, the sheriff duly sold all the interest of the said George, the grandson, in the lands in dispute, and conveyed the same to the said Thomas Keating by deed, dated the 8th December, 1855, registered the 14th of February, 1856.

By virtue of a writ of execution issued out of the County Court of the County of Kent against the lands of the said Thomas Keating, the sheriff of that county sold all the interest of the said Thomas Keating in the same lands, and conveyed the same to one Walter McCrea.

The defendant has duly acquired the title and interest of McCrea.

The question raised for the opinion of the court is, whether, under the will of their grandfather, the plaintiff and her brother George took as joint tenants or as tenants in common upon the death of their parents.



If the court is of opinion that they took as joint tenants, then it is agreed that judgment shall be entered for the plaintiff, but if the court is of opinion that they took as tenants in common, then it is agreed that judgment shall be entered for the defendant.

*S. H. Strong*, Q. C., for the plaintiff. *Kingston* for defendant.

Jarman on Wills, 3rd ed., vol. ii., p. 699; *Doe Littlewood v. Green*, 4 M. & W. 229; *Barker v. Giles*, 2 P. Wms. 280; *Peebles v. Kyle*, 4 Grant, 334; *Taaffe v. Conmee*, 10 H. L. Cas, 64, 8 Jur. N. S. 919; *King v. Melling*, 1 Ventr. 216; *Haddelsey v. Adams*, 22 Beav. 266, were referred to on the argument.

DRAPER, C. J.—In *Taaffe v. Conmee*, in Dom. Proc. (8 Jur. N. S. 919,) Lord *Westbury*, C., observed, that so far as decided cases are concerned, there is much difficulty in fixing, with reference to the gift of real estate, the true interpretation of the word survivor: that the rule laid down in *Winterton v. Crawford*—viz, that in gifts of personalty the word survivor is considered as referring to the period of distribution—has been pretty generally followed; but his Lordship adds, “It must be left to future decisions to tell us what is the actual rule of construction on this perplexing point.” In reference to the case then in judgment, his Lordship further observes, “There is another and a simpler meaning of the word. The natural and obvious meaning of the word ‘survivor’ is not the person who shall survive or outlive a particular event; but when it is applied to a class of persons and individuals who are named, the natural and obvious meaning of the word is, the longest liver of those who are named; and therefore in this particular case, as in other cases, the word survivor should, I think, be regarded, not as referring to any particular event previously mentioned, but as referring to that which, as I have already observed, is the natural meaning of the word—namely, that individual person who, *out of the individuals named*, shall turn out to be the longest liver.”

In a much earlier case, however, (*Doe v. Prigg*, 8 B. & C. 231,) where, after a devise of real estate for life, the testator gave the same property "unto the surviving children of W. J. and of J. W., their heirs and assigns for ever, the rents and profits to be divided between them in equal proportions, share and share alike," the Court of Queen's Bench held that the word "surviving" referred to the testator's death, and not to that of the tenant for life. *Bayley, J.*, in giving the judgment of the court, reviewed the authorities, and remarked that they had not succeeded in finding a case where, upon a devise by way of remainder to *a class*, words of survivorship have been held to apply to the death of the testator. In the present case the children of testator's son and his son's wife Eleanor are distinctly referred to as a class, and are not named as individuals, and in this respect the case is distinguishable from *Taaffe v. Conmee*.

I do not find that *Doe v. Prigg* has ever been formally overruled, and it is apparently at least approved by Lord *St. Leonards*, as is pointed out by Vice-Chancellor *Wood*, in *Gregson's Trusts* (10 Jur. N. S. 696.) But in *Wordsworth v. Wood*, (1 H. L. Cas. 129, 11 Jur. 593,) Lord *Brougham* treated *Doe v. Prigg* as "a very extraordinary case," adding that the reason given for the decision does not support it. Nevertheless V. C. *Wood* held in conformity with it, that on a devise over after a life estate, that certain freeholds "should be shared, share and share alike, amongst the following persons, or the survivors of them," the estate vested at the testator's death in the several persons named. It is obvious on reading the decision that the learned Vice-Chancellor, while expressing himself sensible of the inconvenience of having one rule as to personalty and another as to realty, felt bound by the authority of *Doe v. Prigg*. He had previously, in *Spurrell v. Spurrell*, (17 Jur. 755,) held that where there was a gift to several persons, or the survivor of them, after the determination of previous life estates, the period of the distribution of the fund was the period of ascertaining the persons in whom the fund vested.

In our own court of Chancery, however, it was held that where the testator devised real estate to his wife for life, with remainder to A. B. and C., or the survivors or survivor of all of them in fee, the survivors at the death of the tenant for life, and not at the death of the testator, took the remainder.—*Peebles v. Kyle*, (4 Grant 334.) And this opinion is confirmed in *Gregson's Trusts*, (10 Jur. N. S. 1138,) where the decision of the Vice-Chancellor was reversed on appeal. Sir *G. J. Turner* lays down as the proper rule of construction, "that the words of a devise are to be construed according to their common and ordinary meaning, and in the sense in which they would be understood by persons of common understanding." He says the word "survivors" is a term of relation, and must have reference to some particular period: that in the will then under his consideration it is placed in immediate connection with the death of the tenant for life under the will, and that no other period except that of the death of the tenant for life is referred to by the testator; and without reference to the authorities he concludes that the property in question belongs to such of the devisees in remainder as survived the tenant for life. He then refers to the authorities, and says the cases on this subject are irreconcilable, and among others, cites *Young v. Robertson*, (4 Macq. 314, 8 Jur. N. S. 825,) in which he thinks the House of Lords have held very decidedly that the general rule must be taken to be, that survivorship is to be referred to the period of distribution; and concludes that, however the case might have been decided in times long gone by, it ought now to be held that the fund should be divided between such only of the devisees in remainder as survived the tenant for life.

I can find no substantial distinction between that decision and the present case, where the devise of the remainder in fee is stated to be "*after the decease*" of the tenants for life. As to this question, therefore, I conclude that the devise vested the land in the two children of George and Eleanor his wife, who survived their parents, and that nothing passed to Edmund, who died in the life-time of the tenants for life.



The plaintiff's contention has been, that the words of the will, "to have and to hold the same to the said children of the said George Jacob, or the survivors of them, forever, share and share alike," created a joint tenancy in the children, and that the plaintiff, as surviving joint tenant, took the whole. But on the authorities above referred to it appears to me that the word "survivors," connected with the words "after the decease" of George Jacob and his wife, was meant and was used to point out the time at which the remainder in fee should vest in possession, as well as the persons in whom it should vest. Upon this construction the plaintiff and her brother became tenants in common in fee of the remainder, for as Edmund Jacob died in the lifetime of the tenants for life, no interest absolutely ever vested in him. And on this construction of the word survivor no joint tenancy whatever arises, wherefore the case of *Doe v. Green*, (4 M. & W. 229,) has no application.

In my opinion our judgment should be for the defendant.

HAGARTY, J.—After the devise for life to his son and wife, with benefit of survivorship, the testator says, "that after the decease of the said George Jacob and his said wife, I give, devise, and bequeath the said land (so devised to them) to the children of the said George Jacob and his wife, including Edmund Jacob, son of said George Jacob by his first wife, *to have and to hold the same to the said children of the said George Jacob, or the survivor of them, for ever, share and share alike.*"

As to the idea present to the mind of the writer of these words, I should say it was that on the death of the last tenant for life, he desired that all the surviving children capable of taking should take as tenants in common. To the testator's mind it is probable the contingency of Edmund dying and leaving issue before the determination of the life estate was not presented; as it was, he died without issue before the tenants for life.

The rule for personalty is clear enough, as the Master of the Rolls explains in *Drakeford v. Drakeford*, (9 L. T. Rep. N. S. Rep. 10.) "The rule of construction is, that the period

for ascertaining the survivorship amongst a class of legatees is the time for the distribution of their bequest, unless the testator has himself otherwise directed."

But as to realty Lord *Westbury* says, in *Taafe v. Conmee*, (10 H. L. Cas. 64, 8 Jur. N. S. 921,) "It is undoubtedly true that, so far as decided cases are concerned, there is much difficulty in fixing, with reference to the gift of real estate, the true interpretation of the word 'survivor.' \* \* \* In gifts of personalty the word may be taken as referring to the period of distribution. In gifts of real estate it ought to be referred, if the same rule were applied, to the determination of the prior limitation. \* \* \* I agree with the observations of the learned author, Mr. Jarman, that it must be left to future decisions to tell us what is the actual rule of construction on this perplexing point in reference to real estate."

In the very recent case of *Gregson's Trusts*, (11 L. T. Rep. N. S. 460,) the Lord Justices, in reversing the order of *Wood, V. C.*, do not refer to *Taafe v. Conmee*. The devise is that after the death of testator's wife, tenant for life, "the whole of the property shall be shared, share and share alike, amongst the following persons, or the survivors of them, viz," naming twelve individuals. Six only survived the widow. The court held that only those six could take, to the exclusion of the representatives of the deceased six. Sir *George Turner* reviews the cases, and says, "The governing question" (*i.e.*, both as to realty and personalty) "is and always has been treated as being the intention of the testator. The law is subordinate to the intention."

After suggesting that some of the cases were in favor of an immediate vesting on the death of testator, on the apparent ground that unless the vesting was so held the remainders would be contingent, and would be liable to be destroyed, and therefore that the law favored the early vesting of estates, he says, "It is not satisfactory to my mind that a forced and strained construction should be put upon the words of a testator's will, in order to meet the inconveniences of tenure."

With the law thus expounded as late as November last, and with the decision of our Court of Equity to the same effect, I think we must decide in favor of the defendant.

I cannot say my mind is wholly free from doubt. The observations of Lords *Westbury* and *Cranworth*, in *Taafe v. Conmee*, as to substituting for "survivor" the words "longest liver," as a legal equivalent, do not tend to remove such doubt. Had Edmund, the grandson named, left issue, according to the present decision such issue would be excluded. I am not satisfied that the testator, if the contingency presented itself to his mind, intended that such should be the effect. But it is useless to speculate on a testator's views beyond the legal effect, as declared by express decision, of the words he has chosen to use.

MORRISON, J., concurred.

Judgment for defendant.

#### LUKE LEECH V. MARGARET LEECH AND ELIZABETH CRAIG.

*Ejectment—Tenancy as common—C. S. U. C. ch. 37, secs. 29, 30—Neglect to give notice under—Voluntary conveyance—Registration.*

In ejectment for part of the east half of a lot, it appeared that L., the patentee, in 1855 executed an agreement under seal, whereby he gave to his son James his right, title and interest of one-half of the east half, with certain portions of the house, stipulating that he was to till the farm as usual, and give his father one half of the produce, if demanded. In 1863 L. conveyed to two other sons the east half, the consideration expressed in the deed being £500, and their vendee brought ejectment against the widow and devisee for life of James. She defended for the whole, giving no notice of defence as tenant in common, under sec. 29 of the Ejectment Act, Consol. Stat. U. C. ch. 27. The jury found that the deed of 1863 was voluntary.

*Held*, that the effect of the deed of 1855 was to give an undivided moiety of the half lot to James, but that defendant not having limited her defence, the plaintiff was entitled to the postea.

*Held*, also, that the prior registration of the deed of 1863 could have no effect, the jury having found it to be without consideration.

EJECTMENT for fifty acres, part of the east half of No. 12, in the 9th concession of Beckwith, described by metes and bounds. Defence by Margaret Leech for the whole.

The case was tried at Perth, in October, 1864, before *Richards, C. J.*



It appeared that by letters patent, dated the 19th of May, 1824, the Crown granted the east half of No. 12, in the 9th concession of Beckwith, to William Leech the elder, in fee.

The plaintiff then proved a deed, dated the 6th of January, 1863, from William Leech to Robert Leech and William Leech the younger, of the same land, consideration expressed in the deed £500, in fee. Also a deed dated the 13th of July, 1864, from Robert and William Leech to the plaintiff, in fee, consideration \$1,000, for the land described in the writ.

The defendant put in an agreement under seal, the execution of which was admitted, made between William Leech, the patentee, and his son James, whereby, in consideration of natural love and affection, William Leech gave to James Leech, and his lawful heirs for ever, his right, title and interest of one-half of the east half of lot No. 12, in the 9th concession of Beckwith, in fee, together with the part of the stone house commonly called the kitchen, and a sleeping room off the kitchen, also with the privilege though (a) the back room to the seller, (b) and privilege of the cellar, together with the part upstairs over the kitchen, together with one-half of the stock of cattle and movable property; "James Leech is to till the farm as usual, and to give his father, William Leech, one-half of the produce, if demanded," dated the 14th of July, 1855. One of the subscribing witnesses to this instrument was Robert Leech, one of the grantees in the deed of January, 1863.

James Leech died in possession of the premises in December, 1862, and his widow, the defendant, was in possession.

By his last will James Leech devised the premises in question to his wife for life, or during widowhood, and to his son William Henry after the widow's death.

It was objected for the plaintiff that the conveyance to James, if operative at all, made the parties tenants in common, and not joint tenants, and that the 29th and 30th sections of the Ejectment Act, Consol. Stat. U. C. ch. 27, applied. Reference was also made to 24 Vic., ch. 41, sec. 7, sub-sec. 6.

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(a) *Sic. Qu.* through.      (b) *Sic. Qu.* cellar.

On the part of the defendant it was objected that the plaintiff should have proved a notice to quit or a demand of possession, and leave was reserved to the plaintiff to move to enter a nonsuit on this objection.

The jury were directed that if they found the deed of January, 1863, was a voluntary deed, to give a verdict for the defendant; but leave was reserved to the plaintiff to move to enter a verdict for him, if the court should be of opinion that under the conveyance to James Leech the latter took merely as tenant in common of the whole east half. He had similar leave to enter a verdict for him for the whole, or such part as under the instrument of June, 1855, and the notices of title, the plaintiff was entitled to recover.

The question of valuable consideration to support the deed of January, 1863, of which there was very loose evidence, was expressly left to the jury, to determine whether that deed was fraudulent or no.

They found for the defendant.

In Michaelmas Term *S. Richards*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to leave reserved, on the ground that the conveyance to James Leech conveyed only an undivided moiety, if it conveyed anything, and the plaintiff proved title in himself to at least an undivided moiety, and no notice was given that defendant defended as joint tenant or tenant in common, or admitted the right of the plaintiff; or for a new trial, the verdict being against law and evidence and the judge's charge, the instrument of June, 1855, giving only a life estate, or being a voluntary conveyance, and made void by the deed from William Leech, which was made for valuable consideration, or was made void by the first registration of such last-mentioned deed.

*Robert A. Harrison* shewed cause, citing *Lane v. Jarvis*, 5 U. C. R. 127; *Roe dem. Wilkinson v. Tranmer*, 2 Wils. 75; *Shove v. Pincke*, 5 T. R. 124; *Nicholson v. Dillabough*, 21 U. C. R. 591; *Fraser v. Fraser*, 14 C. P. 78; *Vandelinder v. Vandelinder*, 14 C. P. 129; *Cru. Dig.* vol. iv., title

32; Bac. Abr. title "Grant;" Cummings v. McLachlan, 16 U. C. R. 626; Mountjoy v. The Queen, 1 Appeal Rep. U. C. 429.

*S. Richards*, Q. C., contra, cited *McCallum v. Boswell*, 15 U. C. R. 343.

DRAPER, C. J., delivered the judgment of the court.

According to the letters patent this half lot had a frontage of fifteen chains, while according to the description in the writ of summons it must be twenty-eight links wider. This latter description shews that rather more than the east half of the half lot as granted is claimed in this action, for both in the front and the rear this description extends ninety-nine links beyond the centre of the half lot granted, though this additional ninety-nine links are only claimed for a distance of four chains and six links from the front and the rear respectively. The rest of that line from front to rear is described as running along the centre of the half lot, though the course is erroneously given, the word "east" being obviously omitted.

The claim is founded on the deed of January, 1863, which covers all the half lot granted by the Crown. The defendant relies on the deed of June, 1855, and her deceased husband's will. The jury have found the deed of January, 1863, to be a voluntary deed, and it was not shewn that the claimant paid any valuable consideration for the conveyance of the land to himself. His title fails, therefore, as to the land that was conveyed in 1855 to James Leech. We think that the conveyance of June, 1855, operated to give to him an undivided moiety in fee of the half lot granted by the Crown to his father. Still the claimant has a title to the other undivided moiety.

The defendant has not given, or, which for present purposes is the same thing, has not proved, a notice to the claimant that she defends only for the undivided moiety, admitting his title to the other moiety, nor has she denied actual ouster, and no question as to actual ouster could be submitted to the jury, as provided for by the 30th section of the Ejectment Act. Then, according to *McCallum v. Bos-*



well, (15 U. C. R. 343,) she was not entitled to set up that she was tenant in common or joint tenant with the claimant, and to insist on proof of ouster. In effect she wholly denies the right of the claimant to possession, and holds adversely to him, while he shews a right to an undivided moiety. Besides, the defendant's title covers only half of the half lot, and the description in the writ of summons covers more, and the defence is for the whole.

We think, therefore, the claimant is in strictness entitled to the *postea*, the defendant having neglected to limit her defence. For the finding of the jury that the deed of January, 1863, was voluntary, only avoids its operation as to the undivided moiety conveyed to James Leech, and the other undivided moiety nevertheless passed. The defence extends to that as well as to what the defendant's title covers.

The objection taken to the defendant's title under the registry act is disposed of by the finding of the jury also, because the deed of January, 1863, being without consideration, its registry prior to that of the deed of June, 1855, will not avoid the latter, within the language of the Consol. Stat. U. C., ch. 89, sec. 53, or of 24 Vic., ch. 41, sec. 7, sub-sec. 6.

The parties having now got the verdict of a jury on the facts, and the opinion of the court on the law, in relation to their respective titles, would we think do wisely to make a partition with mutual releases. They might submit the division to arbitration, if they cannot agree upon it themselves, if there is no difficulty arising from the infancy of William Henry Leech, to whom his father James has devised the remainder in fee.

We will suspend the formal delivery of judgment until the second Monday in next term, to give time to make arrangements, and to avoid further useless and expensive litigation.

## THOMAS, SHERIFF, &amp;C., v. THE GREAT WESTERN RAILWAY COMPANY.

*Sheriff—Poundage.*

The sheriff cannot maintain an action against the execution debtor for his poundage.

This was an action brought by the plaintiff, as sheriff, to recover from the defendants the poundage upon £1,160, paid by defendants in a suit of one Margaret McKay Braid against them, while a *fi. fa.* was in the plaintiff's hands under which he had seized the goods of defendants to the value of the amount claimed.

A special case was stated for the opinion of the court without pleadings. It was contended for defendants that they, as the execution debtors, could not in any event be held liable to the plaintiff, and that he was not entitled to poundage under Consol. Stat. U. C. ch. 22, secs. 270, 271, the money not having been actually levied by him. It is unnecessary to state the facts upon this last branch of the case, as the judgment does not turn upon it, and the question has been decided in the case of *Buchanan v. Frank*, 15 C. P. 196.

The sum of £8 11s. 3d. was agreed upon as the amount to which the sheriff would be entitled if he could claim only fees for the services actually rendered.

*Robert A. Harrison* for the plaintiff. *Downey* contra.

DRAPER, C. J., delivered the judgment of the court.

Under the statute 29 Eliz., ch. 4, the sheriff might maintain debt for his poundage, as the cases of *Lyster v. Bromley*, (Sir W. Jones, 307; S. C. Cro. Car. 286,) *Tyson v. Paske*, (2 Lord Raym. 1212, S. C. Salk. 333,) and *White v. Haugh*, (2 Str. 1262.) and the case of *Rawstorne v. Wilkinson*, (4 M. & S. 256,) shew that the statute 43 Geo. III., ch. 46, sec. 5, has not taken away the sheriff's right of action for poundage against the plaintiff in the execution, and this right extends to poundage on executing an *elegit*. Before this last-mentioned statute the sheriff used to levy

the debt recovered by the judgment, and satisfy himself out of it for the poundage, and pay over the residue. The statute "gives a boon to the plaintiff in the action, who is entitled to levy under an execution against the goods of the defendant, that he may levy the poundage, fees and expenses of the execution, over and above the sum recovered by the judgment." (4 M. & S. 258.) But the boon was to the plaintiff, not to the sheriff, who was merely the minister of the law to enforce in his behalf this additional right, the plaintiff remaining liable to the sheriff as before. We do not find an instance, either before or since that statute, in which such an action has been maintained in England by the sheriff against the execution debtor. The argument of counsel in *Rawstorne v. Wilkinson* shews how the law was understood: "For if the goods be insufficient for the plaintiff to levy both debt and poundage, it is plain that unless the sheriff may demand his poundage *of the plaintiff*, he will be without remedy." *Thomas v. Cotton*, (12 U. C. R. 148,) otherwise in favor of the plaintiff, was an action against the execution creditor.

It appears to us this action is not maintainable. It certainly was not before the statute 29 Eliz., and since that act we do not find anywhere the slightest authority for it against the execution defendant.

If it were otherwise, the 271st section of the Common Law Procedure Act presents a difficulty which it would be difficult to overcome, but it is in our opinion unnecessary to consider it.

We think the *postea* should be given to the plaintiff, but for the lesser sum of £8 11s. 3d.

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## MASON V. MORGAN.

*Injury by domestic animals—Trespass maintainable—Evidence of scienter—Right of bailee or owner to recover—General verdict on two counts—Plaintiff not bound to elect.*

*Held*,—affirming the judgment of the County Court, and Blacklock v. Millikan, 3 C. P. 34,—that trespass is maintainable against the owner of a bull which has broken into the plaintiff's close, and there killed his mare, defendant not being present or aware of the act.

*Held*, also, that upon a count in case, alleging defendant's knowledge of the bull's vicious propensity, the fact that he had at once admitted that his bull had done the injury, and offered the plaintiff \$10, was properly submitted to the jury as evidence of such knowledge, with a caution, however, as to its weight, as in Thomas v. Morgan, 2 Cr. M. & R. 496.

The mare was in the plaintiff's field at the time of the accident, and had been put there by his father, who said he had given it to the plaintiff. *Semble*, that the right of property was immaterial, as the defendant, even if only a bailee, could recover its value against a wrong-doer.

The plaintiff having declared in one count for entering his close, and there destroying his mare, and in the other in case for keeping the bull, knowing his vice, &c., and having recovered a general verdict, *Held*, that he was not bound to elect upon which count to take his verdict. Haacke v. Adamson, 14 C. P. 201, remarked upon.

APPEAL from the County Court of the United Counties of York and Peel.

The declaration contained two counts.

*First count*.—For that the said defendant broke and entered a certain close of the plaintiff, called and known as lot 31, in the 3rd concession of the township of Scarboro', in the County of York, and then and there, with a certain bull of the defendant, tore up, damaged, and spoiled the earth and soil of the said close, and also then and there with the said bull cut, gored, wounded, and killed divers, to wit, two horses of the plaintiff, then and there found and being quietly depasturing in the plaintiff's said close, and other wrongs did, to the plaintiff's damage.

*Second count*.—And whereas also the defendant wrongfully kept a certain bull of a fierce, wicked, and mischievous nature, well knowing that said bull was of such fierce, wicked, and mischievous nature; and the said bull, whilst the defendant so kept the same, attacked, gored, cut and wounded two horses of the plaintiff, whereby the said horses became sick, sore, lame, and disordered, and one of the said horses by means thereof died, and the plaintiff was put to great expense and loss in curing and taking care of the other of said horses.

*Pleas.*—1. To the first count, not guilty; 2. To the first count, that he did what is complained of by the plaintiff's leave; 3. To the second count, not guilty.

At the trial the defendant was allowed to add a plea denying the plaintiff's property. The evidence shewed clearly that the injury complained of was done by the defendant's bull, which had got into the plaintiff's field, as it was alleged, by defects in the defendant's fence. It was proved that the defendant more than once admitted that he had no doubt his bull had committed the injury, and that he had offered the plaintiff \$10. He mentioned this offer to a magistrate who was endeavoring to effect a settlement between them, and said he would have done more if it had not been for a summons he had in his hand. The only evidence as to property was given by the plaintiff's father, who said, "I gave the mare to the plaintiff: I left her with three others on the plaintiff's place: I told the plaintiff that when the mare foaled, if she turned out a good mare, I would give it to him. That was all that took place about giving the mare to the plaintiff."

A verdict having been found for the plaintiff, a rule *nisi* was obtained for a new trial, or to arrest the judgment, which, after argument, was discharged. The objections taken, and the points decided, are fully stated in the following judgment given in the court below.

HARRISON, Co. J.—This was an action for the loss of a mare which was in the plaintiff's field, and which was gored by defendant's bull, which broke into the field from the defendant's close, as was alleged, from defect of fences. The declaration contained two counts. 1st, a count in trespass *quære clausum fregit*, alleging the injury to the mare as damage; and 2nd, a count in case, alleging a *scienter* by defendant. At the trial it was contended that no action was maintainable on the first count, because trespass would not lie, and the case of *Beckwith v. Shoredike* (4. Burr. 2092) was relied on; and that the action in the second count failed, because there was no sufficient proof of *scienter* by the defendant. A further issue was raised that there was no

proof that the mare was the property of the plaintiff, as affecting the damage on the first count, and the gist of the action on the second.

I overruled the objection that trespass was not maintainable, and so directed the jury; but as there might be said to be some ambiguity in the evidence on the question of property, I allowed a plea denying the plaintiff's property to be put on the record, and left that question, as well as the question of *scienter*, to the jury, who found for the plaintiff on both counts. The plaintiff had refused to elect on which of the two counts he would take the verdict, as it was objected he was bound to do by the defendant.

On the motion in term the same objections were urged, and were those only relied on. On the first point I thought I was bound by the decision in *Blacklock v. Millikan*, (3 C. P. 34,) and the cases there cited, to hold that trespass was maintainable in the present case, and that the case in *Burrow* was not an authority against the position. I ought to mention that I found that the doctrine held by Mr. Chief Justice *Macaulay* appeared to be recognised in most of the text writers on the subject. I considered, therefore, that the plaintiff had a right of action on the first count.

As regards the second point, I had the case of *Thomas v. Morgan* (2 C. M. & R. 496) before me when I charged the jury. I told them that the prompt and direct admission by the defendant that his bull had done the injury, and his offer of recompense, were proper evidence for them to consider whether the defendant knew anything of the propensity of the animal, and I accompanied that statement with the strong observation mentioned in that case, although the admission in the present case appears to be much stronger than that in *Thomas v. Morgan*. I thought, therefore, the jury having found for the plaintiff, he was entitled to retain his verdict on the second count.

As to the third point, the plaintiff's property in the mare, the defendant relied on the expressions of the father of the plaintiff, who was called as a witness. He said he gave the mare to the plaintiff, and in cross-examination he said,



“when the mare was foaled, he had said he would give her if she turned out well, and that was all that took place.” This might be equivocal, and so I thought it a proper question for the jury. They appeared to think that as the plaintiff had the mare at three years old in his own field, the expressions used had reference to a promise to give, made when the mare was a colt, which had been subsequently carried into effect; and having found for the plaintiff on this point, I had no reason to be dissatisfied with the finding.

On the fourth point, whether the plaintiff was bound to elect one of the two counts, if my conclusions be correct, he had a good cause of action on both, and technically they were distinct, the one for an injury to his close, with a damage to his personal property, and the other for a distinct injury to the latter. Substantially, perhaps, there was only one wrong complained of, but then the plaintiff only got damage in respect of that, and so I could see no objection to the finding a general verdict on both counts, as would have been the case if either of the two counts had not been for any cause maintainable, in which case, of course, there should have been a new trial.

I therefore, upon the whole case, discharged the rule *nisi* for a new trial.

From this judgment the defendant appealed, on the following grounds:

1. That trespass *quære clausum fregit* is not maintainable on the facts adduced in support of the first count, and the remedy of the plaintiff, if any, is case, not trespass.

2. That were the law otherwise, the mare killed not being shewn to be the property of the plaintiff, but of his father, and no injury to the soil being shewn, the plaintiff is not on the first count entitled to substantial damages.

3. That there was no sufficient evidence to support the averment of *scienter* in the second count, and, on the contrary thereof, the evidence wholly disproved that averment.

4. That there was no sufficient evidence to sustain the issue of property in the mare killed as being the property of

the plaintiff, but, on the contrary thereof, the evidence wholly disproved the issue joined as to property on the second count.

5. That the plaintiff proved only one wrong, and having proved no more is not entitled to hold a general verdict on two independent counts charging two distinct wrongs; and the jury, though polled, were wholly unable to decide in respect of which counts the plaintiff was entitled to recover.

6. That the plaintiff failed on the evidence to sustain the first and second counts, or one or other of them, and the verdict being general on both counts, there ought to be a new trial.

*Robert A. Harrison*, for the appellant, cited *Mason v. Morgan*, 10 U. C. L. J. 189; *Blacklock v. Millikan*, 3 C. P. 34; *Beckwith v. Shoredike*, 4 Burr. 2092; *Millen v. Fawtrey*, Sir W. Jones, 131, Popham, 161; *Brown v. Giles*, 1. C. & P. 118; *Anon. Ventr.* 295; *Chy. Plg.* Vol. I., p. 93; *Thomas v. Morgan*, 2 Cr. M. & R. 496; *Holford v. Dunnett*, 7 M. & W. 348; *Haacke v. Adamson*, 14 C. P. 201; *Midland R. W. Co. v. Bromley*, 17 C. B. 372, 382; *Trew v. R. W. Passengers Assurance Co.*, 6 Jur. N. S. 759.

*John Bell*, Q. C., contra.

HAGARTY, J., delivered the judgment of the court.

That portion of the appeal which insists that the second count fails in proof of the "scienter" may be disposed of by referring to the view of the law expressed in *Thomas v. Morgan*, referred to by the learned judge of the court below. The expressions of the defendant were proper to be submitted to the jury, accompanied by the caution as to their weight. It is contrary to the practice of this court in appeals to weigh the evidence or to interfere with the finding of the jury, so long as there was evidence legally entitled to be submitted to them; and the learned judge below is not dissatisfied with the finding.

As to the right of property in the animal killed, it seems immaterial, as the plaintiff in any event could recover its value against a wrong-doer, although a mere bailee. This

point was discussed in the case of *Irving v. Hagerman*, in this court (22 U. C. R. 545).

On the first count, the law is not in a very clear state. Defendant's bull breaks and enters the plaintiff's close, and there kills his mare, defendant not being present or aware of the act: can trespass be maintained? The late Sir J. Macaulay, in the case cited in 3 C. P. 34, says, "I have always been of opinion, that for trespasses by domestic animals, such as horses, cattle, pigs, &c., the owner of the close might maintain trespass against the owner of the animals, unless he can excuse the act for defect of fences," &c.

One of the cases which he cites in support of that view, *Mason v. Keeling*, is reported in 1 Ld. Raym. 606, but more fully in 12 Mod. 332. *Holt*, C. J., says: "The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them," &c., and explains how as to dogs, &c., "notice of their ill quality" is necessary: "If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but if my dog go into another man's soil, no action will lie."

The report in Ld. Raym. 606, is not very clear as to *Holt*, C. J.'s view. He says: "If the owner puts a horse or an ox to grass in his field, which is adjoining the highway, and the horse or the ox breaks the hedge, and runs into the highway, and kills or gores some passenger, an action will not lie against the owner; otherwise if he had notice that they had done such a thing before. \* \* \* But if a servant leaves open the stable door, and a coach-horse runs out and does mischief, it is otherwise."

Perhaps the distinction meant is, that when the animal in the highway attacks or injures a passenger, the owner is not liable, without previous knowledge of the beast's ferocity; but that if such an animal trespass on lands, the owner is liable.

My brother *Morrison* has fortunately noticed a very late case, reported in 34 L. J., N. S., C. P. 31, but much more fully in 17 C. B., N. S. 245, *Read v. Edwards*. There the



distinction between trespasses by dogs and by animals like oxen seems clearly recognised. A case in the Year Book 20 Edw. IV., fol. 10, *b.*, is cited. *Littleton* says: "If a common road lies over the land of divers men, and if a drover come with his beasts and some of them go out of the way, he shall be punished in an action of trespass; and so here." The case in the Year Book was trespass for depasturing the plaintiff's land with beasts. There was a common from which defendant's beasts got into the plaintiff's adjoining lands without his knowledge, and immediately he knew it he (defendant) drove them out.

In *Read v. Edwards*, after very elaborate argument, *Willes*, J., delivers judgment, and says, "The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account,—first, of the difficulty or impossibility of keeping the latter under restraint,—secondly, the slightness of the damage which their wandering ordinarily causes,—thirdly, the common usage of mankind to allow them a wider liberty,—and, lastly, there not being considered in law so absolutely the chattels of the owner as to be the subject of larceny. It is not, however, necessary in the principal case to answer this question."

We cannot see our way to deciding that the opinion of that very careful and experienced judge, Sir *James Macaulay*, was not resting on binding authority, and we therefore think the appeal fails on this point also.

We see no difficulty in the objection that the verdict is general, and that the plaintiff was not put to his election. As we understand *Haacke v. Adamson*, (14 C. P. 207,) it is not held that the election must be necessarily made at the trial, but that in term the plaintiff can be forced to elect on which count to enter his verdict, where only one cause of action is proved, and the verdict is general. Here we find two counts, on either of which the plaintiff could recover damages. We suppose in strictness he may be said to have

a cause of action on each, for the trespass to the realty, and for the damage done by the defendant keeping a mischievous bull. In any event it is no ground (as we understand the rule) for nonsuit or arrest of judgment, where there is no misjoinder and where each count shews a good cause of action, or for new trial. The court can always make the plaintiff elect on which count to enter up his verdict; and after all it is a mere question of distribution of costs.

Appeal dismissed, with costs.

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THORNTON V. THE SANDWICH STREET PLANK ROAD COMPANY.

*Road company—Unauthorized agreement—C. S. U. C., ch. 49, secs. 13, 32—Pleading.*

Plaintiff declared on an agreement with a plank road company, by which he contracted to build four miles of road for them for a certain sum, to be paid to him by the tolls to be collected on said four miles, and on three other miles of road belonging to them; and defendants agreed that he should receive all the tolls on these seven miles until payment of the sum named, with interest. The breach alleged was that they had received the tolls themselves, and had not paid him.

*Semble*, that whether the four miles which the plaintiff contracted to make was part of the road which the company was originally formed to construct, or an alteration or extension of it, the agreement would be invalid, for it would appear from it that defendants were providing to construct and pay for the road by pledging the tolls upon it when constructed, and the statute Consol. Stats. U. C., ch. 49, secs. 13, 32, requires sufficient funds to be raised before beginning to construct:—This would not be borrowing "by mortgage of the road and tolls to be collected thereon," within sec. 32, though it might produce the same result.

Defendants pleaded, on equitable grounds, that they were a joint stock company under the statute: that the agreement was made without the knowledge or consent of the directors, and if with the consent of a majority that it was done fraudulently, and without notice to the other directors to be present when it was considered, and without the corporate seal, or if with it without authority for affixing the same, and without any by-law.

The plea was not proved, and the plaintiff had a verdict, but there were common counts also, to which it could form no defence, and in accordance with an agreement at *nisi prius* both parties were allowed to amend, and a new trial was granted in order to ascertain the facts fully, costs to be costs in the cause.

*Semble*, that the plea should not have been put in issue, being altogether defective and uncertain.

DECLARATION on an agreement under seal, by which, in consideration that the plaintiff should construct four miles of

gravel road for defendants for the sum of £1,625, to be paid to the plaintiff by the tolls to be collected on the said four miles, and on three other miles of road belonging to the defendants, the defendants covenanted that the plaintiff should receive all the tolls which should be collected on the said seven miles of road, until the plaintiff should be fully paid, with interest at ten per cent. per annum on £406 5s. from the time the first mile should be completed, and interest on the further sum of £406 5s. from the time the second mile should be completed, and interest on the further sum of £406 5s. from the time the third mile should be completed, and interest on the further sum of £406 5s. from the time the fourth mile should be completed: that the plaintiff duly constructed the said four miles of road, and the said sum of £1,625, and interest, was not paid, yet the defendants have refused to allow the plaintiff to receive the tolls collected on the said seven miles of road, but have themselves received a large sum of money for such tolls, which they refuse to pay to the plaintiff.

*Second count*, setting out the same agreement, stated that although, before the commencement of this suit, \$890 were owing to the plaintiff for interest on the contract, and though neither the sum of £1,625, or the interest at the rate aforesaid, (ten per cent.,) had been paid to the plaintiff, and although defendants had, since the making of the said agreement, collected \$3,500 for tolls upon the said seven miles of road, and all conditions were performed, &c., yet defendants had not paid to plaintiff the tolls so by them collected, or any part thereof.

Common counts for work and materials, money received to plaintiff's use, and for interest.

*Plea*, on equitable grounds, that defendants were a joint stock company for the construction of roads, formed under the statute: that said agreement was entered into without the knowledge or consent of the directors of the company, and if with the consent of a majority of the directors the same was done fraudulently, and without notice to the other directors to be present on the occasion of considering the entering into said contract; and without the seal of the company, or if with



the seal without any valid authority for affixing the same ; and without any by-law authorizing the contract, or the entering into the same by any officer or servant of the company, or on their behalf. Issue.

The trial took place at Sandwich, before *Hagarty, J.*, in October, 1864.

The contract declared upon, dated the 22nd of May, 1856, and signed by the president of the defendants, with their seal attached thereto, was put in, and the execution of it by the plaintiff and defendants was proved ; and it was also proved that the contract was made under a resolution of the directors, (three out of the five being present,) passed at a meeting held on the 14th of February, 1856 ; and that on the 25th of February, 1856, there was a meeting of the shareholders, who had been notified of the meeting by a printed bill or circular, calling them together to consider this matter. The president and two of the directors approved of entering into the contract. The largest shareholders were at the meeting, and the plaintiff's witness swore he thought a majority of the stock was represented.

The plaintiff did the work under the contract, and it was taken off his hands in 1857. The company had possession of the gates, and the appointment of toll-keepers. The plaintiff seemed to have received the tolls collected at gate No. 2, and to have handed them to the treasurer, who paid back the amount to him. The treasurer also paid to the plaintiff two-fifths of the receipts of the plank road west of the cross, and those two-fifths, and the tolls collected at gate No. 2, barely paid the plaintiff his interest.

On the defence, after taking objection to the legality of the contract, two stockholders were examined, one of whom swore he received no notice of the meeting, though it might have been in the papers. The other stated he was the largest stockholder, and was at the meeting : that one-third of the stockholders might have been present, and perhaps one half were represented ; there were three directors present. This stockholder said he always objected to the arrangement. A witness, who had been a director when the contract was made, swore he was not notified of the meet-

ing, nor was he present at it. He continued to be a director after the contract, and was a director collecting the tolls after this.

It was agreed that the defendants should have leave to move on the objections and on the evidence, and that the plaintiff should have a verdict for £1,625, and £220 interest, in all £1,845, which was entered accordingly. If the court should be of opinion that the agreement was void, then the plaintiff had to resort to the common counts, to which pleas of never indebted, payment and set-off would be added as defence, and the case sent down again.

In Michaelmas Term *O'Connor* obtained a rule calling on the plaintiff to shew cause why a nonsuit or a verdict for the defendants should not be entered, pursuant to leave reserved; or if the plaintiff should elect to resort to the common counts, that a new trial be had, the defendants having leave to plead never indebted, and set-off, pursuant to like leave.

*Alexander Cameron* and *Scott* shewed cause.

DRAPER, C. J., delivered the judgment of the court.

From the learned judge's notes, and from the rule *nisi*, we gather that the defendants had leave reserved to move to enter a nonsuit or a verdict for them, or to apply for a new trial, and to add pleas.

The evidence at the trial is sufficient to establish that the plaintiff has completed his work, and that defendants have accepted it, and have paid moneys on account to the plaintiff, and are collecting tolls on the road constructed by him.

Then the first question that arises is, was the covenant entered into by the defendants *ultra vires*. As facts, if we are to find facts, we find that three of the directors, being a quorum, sanctioned the contract: that it is not established that the stockholders did not approve of it, if that would make any difference: that it was sealed with the corporate seal; and that no fraud was proved, unless implied fraud, if the agreement was *ultra vires*.

But the work being done and accepted, the contract on the plaintiff's part being executed, it is asked now, and it

was consented at the trial, that the application should be made to this court, that the defendants may be allowed to answer the common counts by proper pleas, the equitable plea presenting no defence, though pleaded to them as well as to the special counts.

We must assume that the company was *de facto* formed and in operation under the Consol. Stat. U. C., ch. 49, and that the road in question was in some way within the scope of its operations.

The legislature seem to have intended that any company incorporated under the act to make a plank, macadamized, or gravelled road, not less than two miles in length, should subscribe in the first instance a sufficient sum to complete their undertaking—(sec. 13); and the 32nd section was intended to enable them to raise additional capital for alterations in construction or materials, or for extension of the road, or when the capital originally subscribed should prove insufficient to complete it. For this purpose the directors were authorized by a resolution (1) to issue debentures; or (2) to borrow on security of the company; or (3) by mortgage of the road and tolls to be collected thereon; or (4) to authorize the subscription of an additional number of shares, to be named in the resolution.

Nothing before us shews whether the four miles of road which the plaintiff contracted to construct was part of the road to construct which the company was originally formed, or an alteration or extension of the projected line, and for which the capital was originally subscribed. The contract discloses that at its date the company had three miles of plank road constructed, but that does not shew what was the line of road first projected, nor whether these four miles were part of it. The resolution of the 14th of February, 1856, though spoken of by one of the witnesses, is not before us. If these four miles were part of the original undertaking, the company should have subscribed sufficient capital, and can only use the powers conferred by the 32nd section in the manner therein provided; and so, likewise, if the four miles were an extension. Whichever way it is, we have no proof that they have complied with the provisions of the act.



It is clear to us that the legislature never meant to sanction a company formed under this act to contract for the construction or extension of a road without having first subscribed a capital honestly believed to be enough, or having raised under the powers sufficient money to pay for it. But judging from this contract, the defendants were in fact providing to construct and pay for this road by pledging the tolls to be raised upon it when constructed, together with the tolls on a part or the whole of a road already completed. This is not borrowing "by mortgage of the road, and tolls to be collected thereon," though it may produce the same result. On the contrary, it seems to us a course not authorized, and an evasion of the principle which we think was to govern, to provide funds before beginning to construct; and such a conclusion would be fatal to the plaintiff's recovering on the first and second counts.

But we ought to know what the facts really are, and not give any judgment until we do, which will determine the rights of the parties. The two first counts are limited to a statement of the contract, and of plaintiff's performance, assigning breaches of the defendants' covenant. The plea, on equitable grounds, certainly is as little in accordance with common law rules of pleading as need be, and where it asserts facts is not always sustained by the evidence. It states that the contract was made without the knowledge or consent of the directors. It is sworn that a quorum of the directors, being a majority of the whole number, unanimously sanctioned it. Then comes a statement, that if this first allegation is not true the thing was done fraudulently by a majority, without notice to the others, the absence of which notice is by no means satisfactorily proved; and if it had been, it would still have to be decided whether the act of a quorum is void because other directors, not a quorum, had no notice of their meeting. Then it asserts that the contract is not under the corporate seal, the contrary appearing to be the fact; and then comes an assertion of another fact, in case it should turn out that the statement of the absence of the seal is untrue. We do not understand why such a plea was put in issue, and the cause thus unnecessarily brought to a trial.

It may be that the plaintiff, by proper averments in his special counts, can bring the contract declared on within their statutable power; if so, they may also amend.

Whether the plaintiff may not recover on the common counts, has not been discussed. The defendants desire, by their rule, to plead never indebted and set-off. The leave reserved to move included a plea of payment also.

The last trial is perfectly useless, and we think both parties in fault. Considering the agreement at *nisi prius*, it seems to us the verdict should be set aside, and the defendants have leave to apply, within fourteen days, to a judge in chambers, to withdraw their equitable plea, and to plead to the whole declaration such pleas as the judge on hearing the parties shall in his discretion permit; or to plead to the common counts, letting the equitable plea stand. The plaintiff can apply also, if necessary, to amend, reply several matters, or to demur.

As to the costs of the trial and of this application, we think we may properly make them costs in the cause. The successful party will then recover them.

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### THE OTTAWA UNION BUILDING SOCIETY V. SCOTT.

*Building Society—By-law imposing fines—Construction of—Common counts.*

The by-law of a building society provided, that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of one year, when the share or shares in default shall be declared forfeited to the society." It then directed that a month before the expiration of such year the secretary should send a notice to the defaulter, calling his attention to the by-law; and provided that in case of the defaulter being a borrower these fines should be trebled, and that at the end of six months' default the mortgage should be liable to foreclosure, and to be declared forfeited.

*Held*, that the by-law, being penal in its character, should be construed strictly; and that the fines could be imposed on borrowers only for twelve and on non-borrowers for six months, the right to forfeit or to foreclose being then substituted.

*Held*, also, that such fines could not be recovered on a common count, but that the declaration should set out the by-law, so that the court might judge of its legality.

Declaration. *First count*, on a covenant in a deed, dated 6th of April, 1860, to pay the plaintiffs the monthly sum of £2 16s. 9d. on the first Monday in each month after the

date of the deed, until the said society would become self-extinguished by lapse of time. *Averment*, that the society has not become self-extinguished, &c., and that £147 11s. became due for fifty-two of the said monthly payments, and that defendant has not paid the same.

*Second count*, that defendant, by another deed, dated 15th of August, 1860, promised to pay the plaintiffs the monthly sum of £1 8s. 6d. on the first Monday in each month after the last mentioned date, until the said society should become self-extinguished by lapse of time. *Averment* as before, and that £68 8s. for forty-eight of these payments became due, and that defendant has not paid the same.

3. Common counts, for money lent, for money received to the use of the plaintiffs, for interest, for fines, penalties and forfeitures imposed and inflicted under and by virtue of the rules, regulations and by-laws of the plaintiffs as such building society, and incurred by defendant, who then was and still is a member thereof; and on accounts stated.

*Pleas*.—1. As to \$434.12, parcel of the moneys in the first and second counts mentioned, payment of that sum.

2. To the common counts, never indebted.

3. As to \$434.12, parcel of the moneys in the common count, payment of that sum. *Issue*.

And as to the first and second counts, except as to \$134 12, *nil dicit*. Venire to try the issues, and to assess the damages.

The trial took place at Ottawa, in October 'last, before *Richards, C. J.* The two mortgages were put in, and a certified copy of the by-laws of the building society. The secretary of the plaintiffs was called, and deposed that he had held that office since 1858: that the defendant was a member of the society since its formation, and was a borrower. He produced an account against defendant, who was a borrower, as follows:

1861, June 30. To six months' instalments and management fees on five shares of the Ottawa Union Building Society .....  
To six months' bonus and interest on the above five shares .....

\$ 31 50

70 80



To fines for default of payment of  
five shares, as per the society's  
by-laws,

For 1st. month.....	\$0 15	\$0 75	
“ 2nd. ....	0 30	1 50	
“ 3rd. ....	0 45	2 25	
“ 4th. ....	0 60	3 00	
“ 5th. ....	0 75	3 75	
“ 6th. ....	0 75	3 75	
			— \$15 00
1864, June 30. To three years' instalments and management fees on the above five shares .....			189 00
To three years' fines and interest on same five shares, @ \$11.80 per month .....			424 80
To three years' fines on above shares, @ 75 cents per month...			135 00
July. To one month's instalment and management fees, on above five shares .....			5 25
To one month's bonus and interest on above five shares.....			11 80
To one month's fines on above shares			3 75
			— \$886 90

*Cr.*

1862, July. By cash .....	\$100 00	
“ Sept. By do. ....	100 00	
1863, Dec. By do. ....	234 12	
		— 434 12
Balance due.....		<u>\$452 78</u>

The witness stated, that twenty-five cents a month were due on five shares for management fees, and that he thought they were included in the mortgage.

The plaintiffs' counsel stated, that the fines only were sought to be recovered on the common counts. They amounted to \$153 75c. : the residue was claimed upon the

mortgages. For the defendant it was objected, that these fines were not recoverable at all on this evidence, nor in any event upon the common counts; or if they could recover in this action, they could not under their by-laws claim for more than one year's fines, or more even than for six months.

The verdict was rendered for the plaintiffs, \$452.78, with leave to the defendant to move to reduce it, by either \$153.75, or \$60, or \$15, according to the opinion of the court of the plaintiffs' right to recover on their by-laws.

In Michaelmas term *S. Richards*, Q. C., obtained a rule *nisi*, accordingly. He cited *Bracegirdle v. Hinks*, 9 Ex. 361.

In this term *C. S. Patterson* shewed cause, citing *Card v. Carr*, 1 C. B. N. S. 197; *Reeves v. White*, 17 Q. B. 995.

DRAPER, C. J., delivered the judgment of the court.

The fourth rule or by-law seems to be the only one necessary to be referred to. "Any member neglecting to pay his monthly dues shall be fined as follows :

For first month in default, 5 cents per share.

" second do. do. 10 "

" third do. do. 15 "

" fourth do. do. 20 "

" fifth do. do. 25 "

And for each subsequent month 25 "

until the end of one year, when the share or shares in default shall be declared forfeited to the society. Provided always, that it shall be the duty of the secretary, one month before the expiration of such year, to mail and register a notice, addressed to the defaulter at his last place of residence as recorded on the books of the society, calling his attention to this by-law; and provided, also, that in case the defaulter be a borrower, then the fines shall be respectively three times the above amounts, as per scale; and that at the end of six months' default of payments, the mortgages shall be liable to foreclosure, and to be declared forfeited."

The mortgages are not before us, and were not referred to as having any bearing on the question reserved. We assume therefore that they contain no covenant for the payment of the fines imposed under the by-law.

Two classes of members of the society are mentioned therein. 1. Those who are not borrowers. 2. Those who are. The first part of this by-law applies to the first class, the last part to the second class, to which the defendant belongs. The plaintiffs contend, that for every month which has passed during which the defendant has neglected to pay his monthly dues, he is liable to pay a fine, according to the terms of the by-law. The defendant contends, that the fines as to him extend only over six months from the first default, and that at the expiration of six months the remedy against him is foreclosure and forfeiture. He also contends that the fines even for six months are not recoverable on the common counts.

The first question, therefore, depends wholly on the construction of the by-law. The defendant, we assume, continues a member of the society until it is wound up; but the claim in dispute is not an obligation on him simply because he is such a member, but because having made default in his monthly payments, he has incurred penalties imposed by a by-law. Now, treating this claim as penal in its character, we think we should not by construction extend the meaning of the by-law further than its terms expressly warrant. As to members not borrowers, the by-law imposes fines until the end of one year, and then a different remedy is provided for the society. As to borrowing members, after declaring the amount of the fines, it is provided, that at the end of six months the mortgages shall be liable to forfeiture. We think, reading the whole of this rule or by-law together, the fines imposed on the first class were imposed only for twelve months, and those on the second class are to be treated as if the same form of expression contained as to the first were repeated, "until the end," &c., and then the right to forfeit was substituted for fines. The language is not precise or clear, but in our opinion this is the reasonable construction.

We think, however, the common count is not sufficient, and that it should at least appear what the by-law is in respect of which the fines and penalties are claimed; if for no other reason, that the court may judge of its sufficiency



and legality. All the precedents we have seen set out the by-law, and likewise the authority for making it. We refer, among others, to 1 H. Bl. 370; Lilly's Entries, 153,; and see also Com. Dig. "Pleader," 2 W. 11.

In our opinion, therefore, the whole amount of the fines should be taken off this verdict. The plaintiffs' counsel will consider whether on entering judgment he had not better endeavour to get rid of the common counts, on which in truth he recovers nothing.

Rule absolute to reduce verdict, with costs to defendant of same.

### HOGAN V. BERRY.

*Agreement to clear land, and assignment of, not under seal—C. S. U. C., ch. 90, sec. 4—Right of assignee to the crop.*

D., in November 1862, took land from defendant's agent on a written agreement to clear so much a year, getting certain crops, and all the timber excepting pine of a specified size. In July, 1863, D. wrote to the plaintiff that if he would complete the clearing under this arrangement, and deliver to D. \$40 worth of cordwood, he should have all the benefit arising from it. Under this the plaintiff claimed a crop of wheat sown in the fall of 1863, and seized by the sheriff in July, 1864, under an execution against D. On an interpleader issue the jury found for the plaintiff, negating any fraud as between him and D.

*Held*, that the plaintiff could have no title to the land, for the agreement with D. and assignment to the plaintiff, not being by deed, were both void, under Consol. Stat. U. C., ch. 90, sec. 4; but that having been let into possession by D., and having cultivated the land for his own benefit, and at his own expense, it could not be held that the wheat, which was an independent chattel, not within the statute, was defendant's property; and that the verdict therefore must stand.

INTERPLEADER, to try whether certain goods seized in execution on the 8th of July, 1864, by the sheriff of York and Peel, under a *fi. fa.* tested 4th of May, 1864, on a judgment recovered by the defendant against Isaac Dennis, were, or some part was, at the time of the seizure, the property of the plaintiff as against the defendant.

The issue was tried at Toronto, in October, 1864, before John Wilson, J.

The property in dispute was a stack of wheat on lot number one, in the 3rd concession of King, in the county of York. It appeared that Isaac Dennis had taken this lot from the defendant's agent on an agreement to clear up ten acres a year, he (Dennis) getting the first two crops from

the first ten acres so cleared, and the first crop from each of the other ten acres, each ten acres to be surrounded by a good substantial rail fence; and Dennis was to have the timber, excepting the pine which might be suitable for square timber or saw-logs. This was agreed on in November, 1862. The plaintiff put in a letter, addressed by Dennis to himself, dated the 3rd of July, 1863, as follows:

“Mr. John Hogan. If you will take in hand that clearing on lot number one, and complete the same according to my arrangement with Mr. Berry, you shall have all the benefit or profit arising from it, by delivering to me at King station \$40 worth of cordwood this fall.”

The wheat in question was sown on this land, in the fall of 1863; and after it was sown Dennis took the defendant's agent to the field, to shew him what had been done. The plaintiff was living with Dennis at that time. In April, 1864, the defendant's agent went to look at the wheat; Dennis then took him to see it. Hogan was working on a chopping near, but made no claim then. Evidence was given to establish that Hogan sowed the wheat field with grass seed in the spring of 1864, and harvested the wheat; also, that Hogan delivered to Dennis five car loads, each about six cords, of wood at the station. It was wood which had been cut on the field in question two years before the trial. Hogan was living at the time of the trial where Dennis did live, the latter having moved off two or three months before. Dennis and his son worked on the place until Dennis left, not being hired, but it was sworn that Hogan paid other men, who were hired to chop, &c.

A nonsuit was moved for, on the ground that the evidence shewed that the wheat belonged to Dennis; and leave was reserved to move for a nonsuit in term. The jury found for the plaintiff.

In Michaelmas term *Charles Carroll* obtained a rule to enter a nonsuit on the leave reserved, or for a new trial, the verdict being against law and evidence, and against the weight of evidence, and for misdirection, in directing the jury that the letter of Dennis conveyed such an interest to

the plaintiff as to entitle him to recover, unless fraud were proved.

*Robert A. Harrison* shewed cause.

*McMichael* supported the rule.

DRAPER, C. J., delivered the judgment of the court.

We think the agreement under which Dennis entered was intended by both parties to it to operate as a lease or a conveyance of an interest in the land. Dennis was to clear the land at the rate of ten acres a year, and to fence it: the first two crops off the first ten acres cleared were to be his, and also the first crop off every ten acres afterwards cleared, and he had the right to take the wood off the lot, pine trees of a certain size excepted. Nothing is said as to the use or occupation of the cleared land after Dennis had taken off the crops to which he was entitled. But to have the benefit of the agreement, he necessarily must have the possession and right to clear and cultivate for two years at least. The agreement, though in writing, is not by deed; and hence, under Con. Stat. U. C., ch. 90, sec. 4, it is void; and so is the assignment made to the plaintiff, as being, if anything, at least an assignment of a chattel interest in land, not made by deed. The plaintiff, therefore, fails to shew any title to or interest in the land.

A growing crop of wheat, however, is an independent chattel, produced by the labour and expense of the occupier of the land for the time being; and it does not fall within the provisions of the Statute of Frauds—(*Evans v. Roberts*, (5 B. & C., 829),—nor within the Consolidated Statutes; and, therefore, if Dennis had sowed it, he might have transferred it to the plaintiff without writing. The case of *Poulter v. Killingbeck* (1 B. & P. 397,) resembles the present in some of its circumstances, though it turns upon a different question. The defendant in this case let Dennis into possession, and now asserts Dennis's right to the crop of wheat which was grown thereon under the agreement.

The plaintiff's case, however, is not that this wheat was sold by Dennis as a growing crop, but that he, being let into possession of the land by Dennis, at his own expense



and labour, sowed and harvested it, so that it never was the property of Dennis at all. The plaintiff had not, in our opinion, acquired the interest of Dennis in the land; but we think all we have to ascertain is, whether he was the actual occupant, by the permission of Dennis, and so cultivated the land for his own use and benefit, and at his own expense. If so, though he may have erroneously believed that Dennis's letter to him operated to assign to himself whatever right and interest Dennis had, we do not see on what ground we can hold that the wheat was the property of Dennis. The jury have negatived fraud as between the plaintiff and Dennis. There may be apparently strong reason for thinking the arrangement was made colorably to defeat any claim the defendant had as a creditor upon Dennis. The plaintiff was Dennis's son-in-law, which may add to the suspicion; and it would seem that Dennis reserved to himself a part of the benefit of the agreement with the plaintiff as to the wood, and that he assisted in the clearing and cultivation of the land, as if he still had the beneficial interest. All this, however, was for the jury. We might not improbably have drawn a different conclusion; but that is not a ground for a new trial.

On the whole, we think the rule must be discharged.

Rule discharged.

BROWN ET AL. V. THE GRAND TRUNK RAILWAY COMPANY  
OF CANADA.

*Railway Company—Neglect to fence—Right of lessees to sue—"Continuation of damage"—C. S. C. ch. 66, secs. 13, 19, 83.*

The Grand Trunk Railway and the Weston Plank Road crossed the plaintiff's land not far apart on parallel lines. The railway company, it was alleged, found it necessary to change the course of a stream over which the road company had built a bridge, to which the latter consented, on the railway company agreeing to make and maintain a bridge for them over the new channel. *Held*, that such agreement could not impose upon defendants any obligation to fence at this latter bridge, or make them liable to the plaintiffs for omitting to do so.

The plaintiffs also sued defendants for neglecting to fence in their own railway. *Held*, that though only lessees of the land, they were "proprietors" within the reasonable construction of "*The Railway Act*," and might recover for damage done to them.

*Held*, also, that the fact of cattle from time to time getting upon the plaintiffs' land and destroying the crops did not constitute a "continuation of damage," so as to entitle the plaintiffs to recover for more than six months' injury; for the continuation of the omission is not what is meant, but of the damage resulting from it, and several unconnected acts of damage, each complete in itself, is not a continuation within the act.

THE DECLARATION stated that the plaintiffs were proprietors of lands in the township of York: that defendants, under the statutes, &c., took a strip of land one hundred feet wide, and constructed their railway thereon, and it became their duty six months after the taking such land to put up, if required by the proprietors, a sufficient fence to keep off hogs, sheep and cattle, and to keep the lands of defendants so taken for the railway divided from the lands of the plaintiffs adjoining, and to maintain such fences in repair. Averment that defendants, after the expiration of six months from the taking the lands did not, although requested by plaintiffs, put up a sufficient fence to keep off all hogs, sheep, and cattle, from the lands of the plaintiffs adjoining, and did not keep the lands of the railway divided from the lands of the plaintiffs adjoining, and did not maintain in sufficient repair such fences—whereby, long after the expiration of six months from the taking of such lands, and after such request, and before, &c., divers horses, &c., &c., crossed, trod down, and entered from the lands of defendants upon the lands of the plaintiffs, and thereby destroyed the crops, grain, and grass of the plaintiffs, and injured the plaintiffs' lands, and property thereon.

*Plea.*—Not guilty, *per stat.* 22 Vic., ch. 66, sec. 83, and ch. 66, sec. 147, Consolidated Statutes of Canada.

The case was tried at the Assizes for York and Peel, in January, 1865, before *John Wilson, J.*

The plaintiffs were lessees of lot number thirty-nine, in the third concession of the township of York, containing seventy-five acres, more or less.

It appeared in evidence, that before the construction of the defendants' railway, a plank road had been constructed, called the Weston Plank Road, across the land now occupied by the plaintiff: that through this land ran a stream, called "Black Creek," over which the Weston Plank Road Company had made a bridge: that the defendants had appropriated a strip of land one hundred feet in width through the plaintiffs' land, north of the plank road, nearly parallel to and within two or three chains of it: that in order to get the creek to pass under the railway at a place convenient for the defendants, they had made a channel for it, more to the eastward than its natural bed: that to do this, it was found necessary to change its channel under the plank road also: that the Plank Road Company (it was said) had consented to this, on condition that the defendants would make and maintain their road bridge over the creek. The defendants made this new channel, and, at a convenient distance from the stream, built walls and wing walls, to correspond with an embankment for their railway, which had been made through and upon the valley of the creek. They spanned the creek with girders, and so left it, and space enough on both sides to allow the plaintiffs to pass and repass as they chose, fencing only from the ends of the wing walls along the embankment.

The plaintiffs' land, after the completion of the railway, was divided into three parts. The largest part was south of the Weston Plank Road, on which was a dwelling house, garden and cultivated ground. The smallest part was between the plank road and the defendants' railway, on which there was a house and garden; the next piece in size was north of the railway, and was chiefly pasture, but contained a small clover field.



The plaintiffs complained that the defendants had not fenced under and around the bridge over the creek on the Weston Plank Road, whereby cattle, &c., got in and destroyed the oats and garden of the plaintiffs there. They contended that the defendants having agreed with the Plank Road Company to maintain this bridge, the duty was cast upon them to fence under the bridge and about it, as if it had been their railway. They complained that the defendants had not fenced the creek and the ground from one wing-wall to the other, and put up and maintained a gate there. And they complained that the fences had not been kept up to the wing-wall on the north-west side, nor maintained at a lawful or proper height from the wing-walls to the high ground beyond the embankment.

The plaintiffs proved that cattle came along the Weston road, got into the creek, and went under the bridge into the plaintiffs' oats and garden south of the Weston road, and did damage there. For this damage the jury assessed \$30.

They proved that cattle got upon the defendants' railway west of the plaintiffs' land, by reason of the fences having been destroyed by fire, crossed over the defective fences by the embankment on the plaintiffs' land, and between the wing-wall and the fence, into the pasture field north of the railway; thence under the railway, which had never been fenced, into the plaintiffs' garden, on his land between the plank road and the railway, and there destroyed his garden stuff. For the damages to this garden the jury assessed \$10, and for damages to the pasture field \$5. But they found that the plaintiffs' own cattle had done one-third of all the damage.

The plaintiffs claimed damages for all the time they had been in possession of the land, but the judge ruled that they could at most recover for damage done for the six months next before the commencement of the suit.

*Bell* (of Belleville) obtained a rule to shew cause why the verdict for the plaintiffs should not be set aside, and a nonsuit entered, pursuant to leave reserved, on the grounds that it was not shewn the plaintiffs

were at the time of the alleged injuries proprietors of the lands mentioned in the declaration, nor that the plaintiffs had, within six months after the building of the railway, required the defendants to fence, nor that at the point where the cattle passed under the defendants' railway, and thus got into the plaintiffs' fields, was the property of the defendants: that the damages were done by cattle straying upon a public highway, contrary to the statute, and which cattle were trespassers, and that the evidence established no liability in this action against the defendants to the plaintiffs; or why the verdict should not be reduced by one or more of the sums mentioned, and separately found by the jury, to such extent as the court might see fit, on the ground, as to the sum found for damages done off the Weston plank road, that the defendants are in no way liable, nor for the damages done between the railway and the Weston plank road; and that the defendants are not liable for any damages done by the plaintiffs' own cattle.

*S. M. Jarvis*, also, on behalf of the plaintiffs, obtained a rule calling on the defendants to shew cause why there should not be a new trial, on the ground of rejection of evidence tendered to shew damage beyond the period of six months prior to the commencement of the action—such damage being continuing, and the action being for a non-feasance, the statute 22 Vic., ch. 66, section 83, does not apply.

Both rules were argued at the same time.

*S. M. Jarvis*, for the plaintiffs, cited *Reist v. The Grand Trunk R. W. Co.*, 15 U. C. R. 355.

*McMichael*, contra, cited *McLennan v. The Grand Trunk R. W. Co.*, 8 C. P. 411; *Augur v. Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 164; *Augur v. Ontario, Simcoe, and Huron, R. R. Co.*, 16 U. C. R. 92.

DRAPER, C. J., delivered the judgment of the court.

We see no obligation whatever imposed by law upon the defendants to erect fences for any other purpose than to separate their railway, or lands taken for the use of it, from lands adjoining thereto. If the proprietors of the Weston plank road were under any obligation as regards the public

to erect and maintain fences on their land or road, to keep it separate from adjoining lands, and neglected to fulfil it, they would be answerable. And if by any contract between them and these defendants, the latter undertook to fulfil such obligation, or to indemnify the plank road company against it, that would make the defendants answerable to the latter company, but not to the parties injured by such omission. We think, therefore, that for so much of the plaintiffs' claim they fail entirely.

It is further objected to the plaintiffs' recovery that they are lessees only and not proprietors of the land, and had no interest in it when part of it was taken for the construction of the railway, and could not therefore have required the defendants to put up a sufficient fence to keep off hogs, sheep and cattle from the land adjoining. Granting this for the moment, it does not in our opinion follow that they would have no remedy for damages arising from the want of fences. We understand the 19th section of Consol. Stats. C., ch. 66, to impose an obligation to fence, at the request of adjoining proprietors, within six months after lands have been taken for the use of the railway, although the construction of the railway is incomplete or even not commenced. The 13th section imposes an obligation to erect and maintain fence, on each side of the railway, obviously referring to its being constructed; and therefore, as the railway is constructed, the duty to maintain fences has arisen and continues.

But further, we think that the plaintiffs, though only tenants, are proprietors within the reasonable construction of the 13th section. The word "owners" is declared by the interpretation clause to mean any corporation or person who would be enabled to sell and convey lands to the company. The word "proprietors" must have another, and we think less extensive meaning, and may be construed possessors having some right in the land; and that if damage results to such a proprietor, from the omission of the defendants to fence or maintain fences within the 13th section, he may bring his action. (a)

The plaintiffs, however, insist that they have a right to recover for all the damages that have accrued during their

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(a) See *Hunt v. Harris*, 12 L. T. Rep. N. S. 421, C. P.



occupation, notwithstanding the 83rd section of the act, which limits suits for indemnity for damage sustained by reason of the railway to six months next after the time of such supposed damage sustained, or if there be a continuation of damage, then within six months next after the doing or committing such damage ceases. They argue that because cattle from time to time entered on their land and eat up vegetables, oats, clover, or other growing produce, this constitutes a continuation of damage, and had not ceased six months before the action was brought. But the depasturing or destroying growing vegetables, &c., in 1863, is surely not a continuation of a similar damage in 1862, nor if the like injury is inflicted in 1864, will that be within the meaning of the act a continuation of damages which began in the preceding years. The omission to erect or maintain fences gives *per se* no right of action to the adjoining proprietor without damage results therefrom. The continuation of the omission is not what is meant, but the continuation of damage resulting from it, and we take it that several unconnected acts of damages, each complete in itself and unconnected with any other of them, will not constitute a continuation of damage within the meaning of the act: that the destruction of a crop of potatoes this year is not a continuation of the destruction of some other crop in the year preceding, any more than if through defect of defendants' fences a horse of the plaintiffs was killed in 1863, they could recover for it in an action brought in 1865, because in the latter year, and within six months before the bringing the action, an ox of the plaintiffs' was killed owing to the same defect for which they sued also, claiming that there was a continuation of damages.

In our opinion the plaintiffs have a right to recover such damages as arose within six months next before the commencement of the action (15th of October, 1864,) from the defendants' breach of the duty imposed upon them by section 13 of the statute. This excludes all claims for damages arising through want or insufficiency of fences at the Weston plank road. The verdict, therefore, should be reduced to \$10, which does not include the damage done by their own cattle.

The cross rule must be discharged.

MEMORANDA.

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During this term the following gentlemen were called to the bar :—EWEN MCEWEN, GEORGE FREDERICK DUGGAN, FREDERICK ARTHUR READ, DONALD MITCHELL McDONALD, THOMAS MACCULLOCH FAIRBAIRN, CHARLES SCOTT, ROBERT VASHON ROGERS, GEORGE KENNEDY, GEORGE AIREY KIRKPATRICK, HENRY HART COYNE, ISAAC FRANCIS TOMS, ROBERT BIRD.

EASTER TERM, 28 VICTORIA, 1865.

(May 15th to 27th.)

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*Present :*

THE HONORABLE WILLIAM HENRY DRAPER, C. B., C. J.

“ “ JOHN HAWKINS HAGARTY, J. (a)

“ “ JOSEPH CURRAN MORRISON, J.

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HAM ET UX. V. LASHER ET AL.

*Costs—Motion to revise—Counsel fees, &c.*

On motion by plaintiffs to revise taxation, *Held*,

1. That under the rule of court of H. T. 22 Vic., 18 U. C. R. 58, now in force, no single judge is authorized to grant an order for a larger counsel fee than the tariff specifies, nor can the Master tax and allow more as between party and party.
2. As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vic., and the Master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries.
3. A misnomer of a witness, *David* instead of *Daniel*, would be immaterial.
4. All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay.
5. No term fee is allowable unless there has been some proceeding during the term.
6. Attendance to hear judgment should only be taxed once—that is, attending when judgment is delivered.
7. Defendants could not tax the costs of enlarging plaintiffs' rule for their own convenience.
8. That service of subpoenas made by one of the defendants could not be allowed, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.
9. That if a brief for second counsel was actually prepared, his accidental absence at the trial should make no difference.
10. Plaintiff having attended under defendants' notice, without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendants' costs.

The question of costs of this application was reserved until after the Master's report.

*J. V. Ham*, in Hilary Term last obtained a rule *nisi* for review of taxation, the application having been referred from

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(a) Mr. Justice *Hagarty* went to England in the week after term, and was absent therefore on the days appointed for giving judgments. He however prepared several judgments, and took part in the consideration of other cases, before leaving, as will be seen in the reports.



Practice Court, and that the Master should disallow :—

1. All sums over \$40 for senior counsel fees at the several trials of this cause.

2. All sums over \$20 for junior counsel fees at the same trials.

3. That the Master should ascertain what sums were paid to witnesses by the defendants before taxation, and should allow no more.

4. That the Master should inquire how much was paid and expended by those witnesses for their travelling expenses, and allow no more.

5. That the Master should disallow payments alleged to have been made to David Chapman.

6. In case the Master finds that Thomas W. Nash was paid before taxation, that he should inquire as to what other cases Nash attended as a witness at the several assizes at which this cause was tried, and apportion the sum to be paid by the plaintiffs accordingly.

7. That the Master should disallow term fees and attendances to hear judgment when judgment was not given, and attendances to enlarge the rule at the instance of defendants.

8. That the Master should disallow the charge for two subpoenas, respectively dated 13th October, 1861, and 18th March, 1863, and copies thereof.

9. That the Master should disallow the copy of brief for second counsel at the first trial.

10. That the Master should tax to plaintiffs the expenses of the attendance at *Nisi Prius* of the plaintiff Eliza A. E. Ham, pursuant to the defendants' notice, and set off the same against the defendants' costs.

It appeared that the defendants' bill was taxed at Kingston at £274 13s. 6d., and on revision by the Master here, was reduced to £195 17s. 0d., £78 16s. 6d. having been disallowed on revision. The bill was originally made up at £371 1s., and the deputy clerk of the Crown at Kingston disallowed £97 15s. According to the revision the bill was nearly double what it should have been.

*Robert A. Harrison* shewed cause. *Ham* supported the rule.

Aliven v. Furnival, 2 Dowl. 49 ; Ward v. Bell, Ib. 76 ; Cleaver v. Hargrave, Ib. 689 ; Daniel v. Bishop, McClelland 61 ; Griffin v. Hoskyns, 1 H. & N. 95 ; Parsons v. Pitcher, 6 Dowl. 600 ; Miller v. Thomson, 4 M. & G. 260 ; Har. C. L. P. A. 712, 713, 715, 716, 664 ; Trent v. Harrison, 2 D. & L. 941 ; Cross v. Durrell, 29 L. J. N. S. Ex. 473 ; Rule of Court, H. T. 22 Vic., 18 U. C. R. 58, were referred to on the argument.

DRAPER C. J., delivered the judgment of the court.

We think the rule must be made absolute on some though not on all the grounds moved.

As to the first and second objections. The practice of granting counsel fees larger in amount than would be taxed by the Master, upon the order of the judge who tried the cause, has obtained as far back as my experience in our courts goes, and is a very old practice in England, where at an early time I believe the judges taxed the costs themselves. In the tariff of fees, published in Draper's Rules of Court, at p. 29, the Master's authority is limited to £5, and the power of the judge is expressly reserved. In the tariff of fees published after the passing of the Common Law Procedure Act of 1856, the power of the judge to increase the counsel fees which the Master is permitted to tax is limited to £20. And in Hilary Term 22 Victoria the last-mentioned rule was rescinded, and the authority to increase was given first to the taxing officer wherever the bill was taxed to allow £5 to senior counsel and £2 10s. to junior counsel, in special and important actions, subject to an appeal to the Master at Toronto, who was authorized to tax to senior counsel not exceeding £10, and to junior counsel not exceeding £5, with brief at trial, with a proviso that no more than one counsel fee should be allowed in any case not of a special and important nature. This is the rule now in force, and under it we are of opinion that no single judge is authorized to grant an order for a larger fee than the tariff specifies, nor can the Master tax and allow more as between party and party. On these two points, therefore, the rule for revision must be granted.

As to the 3rd and 4th, the defendants are bound to a strict compliance with the 165th rule of Trinity Term 20 Vic., and it is open to the plaintiffs to dispute any allegations, or the propriety of any charge, by affidavit, and the Master has authority to make all such inquiries as he deems necessary in order to satisfy himself, without any direction from the court as to what these inquiries should be. Otherwise the court must enter into all the details, and virtually tax the bill themselves.

5th. If the Master is satisfied that there is merely a misnomer, a mere error and oversight in naming David instead of Daniel, and that Daniel Chapman was a witness, and entitled to be and was paid, the error should not deprive the defendants of the amount really disbursed.

6th. All witnesses should be paid before taxation. The Master taxes and allows actual disbursements proved, and not mere engagements to pay. The affidavit of disbursements is required to state that they did not attend as witnesses in any other cause.

7th. No term fees are allowable unless there has been some proceeding during the term. Attendance to hear judgment should only be taxed once—that is, for attendance when judgment is delivered. The defendants are not entitled to tax costs for enlarging the plaintiffs' rule for their own convenience.

8th. If this objection refers to the service made by one of the defendants of two subpoenas on their own witnesses, the charge should be disallowed, unless at the time of the service such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.

9th. If the copy of brief for second counsel at the first trial was actually prepared, the accidental absence of the counsel at the trial should not deprive the defendants of this charge.

10th: The plaintiff, though notified to attend as a witness, is not bound to attend unless paid, and therefore has a sufficient protection without the unusual direction asked for.

Rule absolute.



*Ham* afterwards applied for costs of the application.

*Cur. Adv. Vult.*

HAGARTY, J.—We reserve the question of the costs of this application and of the revision until the Master makes his report. We do not intend to depart from the usual course of making no order as to costs when the necessity of applying to the court arises from an error in judgment of the court's own officers. We are not prepared however to extend a total immunity from costs to parties who, it may possibly be made to appear, have by their own erroneous statements or misconduct caused that officer to err.

#### IN RE BOON AND THE CORPORATION OF THE COUNTY OF HALTON.

*Temperance Act of 1864—By-law under—Motion to quash.*

A by-law passed under 27 & 28 Vic., ch. 18, after having been submitted to the electors, enacted, "1. That the sale of intoxicating liquors and the issue of licenses therefor is by this by-law prohibited within the County of Halton, under authority and for enforcement of 'The Temperance Act of 1864.' 2. That by-law No. 41 is hereby repealed." By-law 41 recited a petition from the rate-payers for it, and enacted that from its passing and approval by the electors, "the sale of intoxicating liquors, and the issue of licenses therefor is hereby prohibited."

The court refused to quash this by-law on account of the second clause, for though its insertion was contrary to the letter of section 2 of the statute, it could have no effect, the prohibition in both by-laws being identical, and the approval of the electors having been obtained; and the defect therefore was "a defect of procedure or form," within section 37.

*Sadleir* applied for a rule calling on the Corporation of the County of Halton to shew cause why by-law No. 42, passed on the 24th of January, 1865, should not be quashed with costs, on the ground that it was in excess of or contrary to the second section of 27 & 28 Vic., ch. 18, which enacts that such a by-law shall not have embodied therein any other provision than the simple declaration, that the sale of intoxicating liquors and the issue of licenses therefor is by such by-law prohibited.

The by-law moved against was as follows:—"To prohibit the sale of intoxicating liquors and the issue of licenses therefor within the County of Halton, under authority and for enforcement of 'The Temperance Act of 1864,' Be it enacted by the Corporation of the County of Halton,

1. That the sale of intoxicating liquors, and the issue of licenses therefor, is by this by-law prohibited within the County of Halton, under authority and for enforcement of 'The Temperance Act of 1864.' 2. That by-law No. 41 is hereby repealed."

It was shewn by affidavit that this by-law was submitted to the electors of the county on the 20th of February, 1864, as a whole, the clauses numbers one and two being together proposed, and no separate vote was taken upon each clause.

By-law No. 41 recited that a large number of the rate-payers of the county had petitioned the council for the passing of a by-law to prohibit the sale of intoxicating liquors and the issuing of licenses therefor within that county, and that the by-law might be submitted for approval to the municipal electors; and enacted, "that from and after the passing of this by-law, and the approval thereof by the municipal electors of the county, the sale of intoxicating liquors, and the issue of licenses therefor, is hereby prohibited."

DRAPER, C. J., delivered the judgment of the court.

The objection is that this by-law, No. 42, has embodied more than the simple declaration mentioned in the statute, for it contains also a repeal of a prior by-law.

The first section of the act gives power to the municipal council to pass a prohibitory by-law; the second relates to the form and contents of such by-law; the third provides that the municipal council, when passing such by-law, may order that the same be submitted for approval to the electors, in which case such approval becomes indispensable.

In this case it is sworn that the by-law moved against was so submitted. I infer there was an order for that purpose, and it is not asserted that the electors disapproved.

It cannot be denied that this by-law is on the face of it contrary to the letter of the act, but unless on examination it is found to be equally in violation of its spirit and true meaning, we should not, we think, quash it on a summary application.

The statute contains no form of the by-law to be followed.

The object of the second section appears to be to ensure that the single question, whether the sale of intoxicating liquors and the issuing of licenses for that purpose should be prohibited, shall be submitted to the electors, and (by sub-sec. 4 of section 5,) it is further provided, that they shall vote only "yea" or "nay" upon that question. If therefore the second section of this by-law does really present another and different question, the proceeding is contrary to the intent of the legislature plainly expressed. But before deciding this, the by-law No. 41 must be looked at, and there we find that it contains in identical words the same prohibition which is enacted in the first section of by-law No. 42. The recital contained in No. 41 is obviously unimportant.

The objection appears then to be merely formal; for, first, the prohibition in the two by-laws is identical; and, second, the provision for obtaining the approval of the electors has been complied with. The repeal of No. 41 is inoperative to effect any change either by removing or imposing an obligation on the municipality, nor does the validity of the last by-law depend in the slightest degree upon the repeal of the first. If the second clause were omitted, the first would have precisely the same effect, and its presence neither qualifies, or limits, or strengthens the first clause. Hence, in our opinion, it comes within the 37th section of the statute, that "no by-law passed under authority and for enforcement of this act, shall be set aside by any court, for any defect of procedure or form whatever." The first section contains the simple declaration required by the statute; the second in reality contains nothing.

Rule refused.

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## DAVIES V. THE HOME INSURANCE COMPANY.

*Fire—Policy on goods—Insurable interest.*

The declaration alleged, in substance, that the plaintiff insured certain goods with defendants, which he afterwards sold to C., to whom with defendants' assent he assigned the policy: that C. sold them to M., taking in part payment his, M.'s notes, which L. endorsed for his accommodation, on a verbal agreement that the goods should be sold by M. and the proceeds as received paid over to L. to retire the notes, and the policy be assigned to L. in trust to secure him against the notes, and pay any surplus to M.: that it was so assigned to L. with defendants' assent and knowledge of all the facts: that M.'s interest in the goods and L.'s liability on the notes continued up to the time of the loss, and that the plaintiff was interested as trustee for them. A loss was then alleged, and non-payment either to the plaintiff or to M. or L.

*Held*, on demurrer, that the declaration shewed no right of action, for that L. had no insurable interest in the goods, and M. was a stranger to defendants, the policy never having been assigned to him.

One condition of the policy was, that "In case of loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proof of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made." &c. *Quare*, as to the exact meaning of such condition.

DECLARATION.—That by a policy of insurance, bearing date the 21st of December, 1861, made by the defendants, the defendants, in consideration of \$42, to them paid by the plaintiff, did insure the plaintiff against loss or damage by fire, to the amount of \$4000, on his general stock of dry goods, contained in the westerly tenement of a two-story stone building, covered with tin, &c., (describing the premises, which were situate in the city of Kingston.) And the defendants for the consideration aforesaid did in and by the said policy promise and agree to make good unto the plaintiff, his executors, administrators or assigns, all such loss or damage, not exceeding in amount the said sum insured, as should happen by fire to the property as above specified, during the term of one year from the 22nd of December, 1861, at twelve o'clock, noon, until the 22nd of December, 1862, at twelve o'clock, noon, the said loss or damage to be estimated according to the actual cash value of the said property at the time the same should happen, and to be paid within sixty days after due notice and proof thereof made by insured in conformity to the conditions annexed to the said policy, unless the property be replaced by similar property of equal value and goodness, or the defendants give notice of their intention to rebuild or repair the damaged premises. And it was also thereby further declared and provided in said policy, that the defendants

should not be liable to make good any loss or damage by fire which might happen by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after fire. And it was further provided in such policy, that if any other insurance had been or should thereafter be made upon such property, and not consented to by the defendants in writing thereon, or if the said property should be sold or conveyed, or the interest of the parties therein changed, or if this policy should be assigned without the consent of the defendants obtained in writing thereon, or if the plaintiff should make any attempts to defraud the defendants, then and in every such case said policy should be null and void. And it was further provided in such policy, that in case of loss the plaintiff should not be entitled to demand or recover on the said policy any greater proportion of the loss or damage sustained to the subject insured than the amount thereby insured shall bear to the whole amount insured on said property. And in said policy it was also declared to be the true intent and meaning of the parties thereto, that in case the above mentioned premises in which said goods insured were kept, at any time during which said policy would otherwise continue in force, should be used for the purpose of carrying on therein any trade or vocation, or for storing or keeping therein any articles, goods or merchandise, denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to said policy, except as herein specially provided for, or hereafter agreed to by the defendants in writing upon said policy, from thenceforth so long as the same should be so used said policy should be of no force or effect; and that said insurance was not intended to apply to or cover any books of account, written securities, deeds or other evidences of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion: and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, (piano fortes in dwelling houses excepted,) paintings, patterns, plate, precious stones, printed music, prints, sculpture, statuary and watches were not deemed to be included in any insurance, unless particularly specified in writing in the said policy; and that whenever gunpowder, phosphorus, saltpetre, or any other article subject to legal restriction, should be kept in said premises in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping was specially provided for therein, said policy should be null and void; and that if any property covered

by the insurance aforesaid be damaged by lightning or the bursting of a boiler, or by explosion from any cause, the defendants should not be liable therefor unless fire ensued, and then for the loss by fire only.

And it was further provided and declared in the said policy, that said policy was made and accepted in reference to the terms and conditions therein contained and thereto annexed, and which are thereby declared to be a part of said contract, and are to be used and resorted to in order to determine the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for. And the plaintiff further says, that the conditions and terms above mentioned as being annexed to said policy, among other things, are as follows: "Applications for insurance on property must be in writing, and must specify the construction and materials of the building to be insured, or containing the property to be insured, by whom occupied, whether as a private dwelling or how otherwise, its situation with respect to contiguous buildings and their construction and materials, and whether any manufacturing is carried on within or about it; and in relation to the insurance of goods and merchandise, the application must state whether or not they are of the description denominated hazardous, extra hazardous, or specially hazardous, and such survey and description shall be taken and deemed to be a part and portion of the policy issued thereon, and a warranty on the part of the insured. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or if during the existence of this policy, or any renewal thereof, the risk shall be increased by any means within the control of the insured, or by the occupation of the premises for more hazardous purposes than are permitted by this policy, or if the insured, at or before the taking of any renewal, shall fail to notify the company of any increase in the hazard, whether within or without the premises, and have the same endorsed thereon, the said policy shall be void. Every renewal shall be deemed to be made upon the faith of the representation on which the original policy was granted, unless superseded by a new description of the risk. The insurance may be terminated at any time at the request of the insured, in which case the company may retain the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of



the policy. If the property to be insured be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented to the defendants, and expressed in the policy in writing, otherwise the insurance as to such property shall be void; and in case of loss the names of the respective owners shall be set forth in the preliminary proof of such loss, with their respective interests. Goods held on storage must be separately and specifically insured. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium. In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proof of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made, otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease. In case of fire or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, and if they shall fail so to do the said company shall not be held liable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood that there can be no abandonment to the insurers of the subject insured. Persons sustaining loss or damage by fire shall forthwith give notice thereof to the company or its agent, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands, and they shall accompany the same with their oath or affirmation declaring the said account to be true and just, shewing also the ownership of the property insured, and what other insurance, if any, existed on the same property, and giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject named, what was their interest therein, in what general manner as to trade, manufacturing, merchandise, or otherwise, the building insured or containing the subject insured, and the several parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss or

damage alleged, and that he is acquainted with the character and circumstances of the insured, or claimant, and that he verily believes that he, she, or they have by misfortune, and without fraud or evil practice sustained loss or damage on the subject insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and whenever required in writing, the insured or person claiming shall produce and exhibit the books of account or vouchers to the insurers or their agent, at the office of the company, in support of his claim, and permit extracts and copies thereof to be made, and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which may have been lost, mislaid, or destroyed, and shall also exhibit to any person named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy, and until such proof, declaration, and certificates are produced, and such appraisement and examination of property permitted by the claimant, the loss shall not be payable. All fraud or attempt at fraud by false swearing or otherwise, shall cause a forfeiture of all claim on this company under the policy. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after having received the preliminary proof of loss required by the 9th article of these conditions. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators indifferently chosen, whose award in writing as to the amount of such loss and damage shall be binding on the parties, but such award shall not determine any question as to the liability of this company under this policy. When property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and insurers in such proportions as to the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant. This company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect of or deviation from the laws or regulations of police made to prevent

accidents from fire in places where laws and regulations on this subject exist. And it is furthermore expressly provided, that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against such company after the expiration of twelve months next after such loss or damage shall have accrued, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

And the plaintiff says that he, the said plaintiff, immediately before the said 22nd day of December, 1862, paid to the defendants the further sum of \$42 to renew and continue in force said policy of insurance, and the plaintiff also paid to the said defendants the further sum of \$42 in one year thereafter, for the like purpose of renewing and keeping in force the said policy; and the defendants did thereupon, in consideration of the said respective payments as aforesaid, renew and keep in force said policy of insurance from the said 22nd of December, 1862, until the 22nd of December, 1864. And the policy was in full force at the time of the plaintiff's loss and damage as hereinafter particularly mentioned and set forth; and the said stock of dry goods was duly insured and covered by the said policy at the time of such loss and damage to the amount of said sum of \$4,000. And the plaintiff at the time of the making of the said policy, and from thence until the making of the assignment hereafter next mentioned, was interested in said property so insured as aforesaid to the amount so insured therein as aforesaid.

And the plaintiff says that while the said policy was in force he, the said plaintiff, assigned and conveyed said property to one Thomas James Claxton, and the said policy was then, with the consent of the defendants obtained in writing on said policy, assigned by the plaintiff to the said Thomas James Claxton, and the said Thomas James Claxton from the time of the said assignment of said property to him until the sale and assignment next hereinafter mentioned, was interested in the said property to the amount so insured as aforesaid, and the plaintiff during all the time was also interested therein and in the said policy to the same amount as trustee of and for the benefit of the said Thomas James Claxton; and the said



Thomas James Claxton afterwards, and while the said policy was in force, sold and assigned the said insured property to one Charles McMillan, who gave in part payment thereof to the said Thomas James Claxton the promissory notes of the said Charles McMillan for the sum of \$7003.35, endorsed by James Linton, which notes were so endorsed by said Linton for the accommodation of the said Charles McMillan, and upon the verbal agreement then made between said Charles McMillan and the said James Linton, that the said property should be sold by the said Charles McMillan, and that the proceeds of said sale, as fast as they accrued and were received by the said Charles McMillan, should by him be paid over to the said James Linton, and by him the said James Linton applied to the payment of the said notes or any renewals thereof, or of any part thereof; and that it was also agreed between the said Thomas James Claxton and the said Charles McMillan and the said James Linton, and it formed part of the consideration of the said sale and assignment, that the said policy should be assigned by the said Thomas James Claxton to the said James Linton, in trust to secure the said James Linton against any loss or damage which he might sustain from such endorsements, or from the endorsements by him of any renewal of said notes, or of any part thereof, and to secure the payment of the said notes, and to apply any moneys received under said policy to the payment and satisfaction of such notes, and of any loss or damage aforesaid, and after payment and satisfaction aforesaid, then in trust for the said Charles McMillan. And the said policy in pursuance of such agreement, with the consent of the defendants obtained in writing on the said policy, was then assigned by the said Thomas James Claxton to the said James Linton in trust as aforesaid, and for the purpose aforesaid; and the defendants before and at the time of such consent had full knowledge and notice of all the facts aforesaid. And the said Charles McMillan from thence, and until and at the time of the damage and loss hereinafter mentioned, was interested in the said insured property to the amount insured thereon, and the said James Linton from the time of the making of such assignment of said policy until the time of the said loss and damage, and from thence hitherto, was and still is liable as such endorser as aforesaid to and for more than the amount so insured as aforesaid, and by reason of the premises during all the time aforesaid had an insurable interest in such property to the amount so insured, and during all that time held said policy for the purposes aforesaid; and the plaintiff, from the time of such

last mentioned assignment of said policy until and at the time of said loss and damage, was interested in the said policy, and in the said insured property, to the amount thereof, as trustee for the said James Linton and for the said Charles McMillan.

And the plaintiff further says that after the making of said policy, and whilst it was in force as aforesaid, and after it was so assigned to the said James Linton as aforesaid, the said stock of dry goods so insured as aforesaid was burned and destroyed by fire, whereby the said Charles McMillan and James Linton respectively, and the plaintiff as trustee for them respectively as aforesaid, suffered damage and loss by reason of the premises to the amount so insured thereon as aforesaid. And all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the benefit of the said James Linton and the said Charles McMillan respectively as aforesaid, and nothing happened or was done to prevent him from maintaining the same, yet neither the plaintiff nor the said Charles McMillan, nor the said James Linton, or any or either of them, have been paid the amount of the said damage and loss, or any part thereof, nor have the defendants made good to the said plaintiff or to the said Charles McMillan or James Linton, or to any or either of them, the amount of said loss and damage, amounting to the said sum so insured as aforesaid, or any part thereof, and the same remains wholly unpaid or made good.

The defendants demurred to this declaration, on the grounds, that James Linton, on whose account this action is brought, had not at the time of the loss in the declaration mentioned any insurable interest in the property insured :—

That by the declaration it appears that Charles McMillan, in the declaration mentioned, for whose account also the plaintiff professes to sue, never had any interest in the policy, the said policy having been assigned to the said James Linton as in the declaration is alleged, and not to the said Charles McMillan.

That the plaintiff, as appears by the said declaration, had no interest in the said goods at the time of the loss, and that, as appears from the same declaration, his name is used only for the purpose of bringing this action ; and that from the declaration it appears that the allegation of an interest in the goods, as averred in the said declaration, as trustee for either the said James Linton or the said Charles McMillan, is untrue.

The case was argued during Michaelmas term last.

*Galt*, Q. C., and *Anderson* for the demurrer, cited *Ogden v. The Montreal Insurance Co.*, 3 C. P. 497; *Stockdale v. Dunlop*, 6 M. & W. 224; *Lucena v. Craufurd*, 3 B. & P. 75, 2 N. R. 269; *Marshall on Ins.*, Book 4, ch. 2.

*S. Richards*, Q. C., and *O'Reilly*, Q. C., (of Kingston,) contra, cited *Park v. Phoenix Insurance Co.* 19 U. C. R. 110; *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Powles v. Innes*, 11 M. & W. 10; *Phillips on Insurance*, sec. 203; *Palmer v. Pratt*, 2 Bing. 185; *Waters v. The Monarch Assurance Co.*, 5 E. & B. 870; *Marks v. Hamilton*, 7 Ex. 323; *Perchard v. Whitmore*, 2 B. & P. 155, note; *Sm. Merc. L.*, 6th ed., 343; *Watson v. Duke of Wellington*, 1 Russ. & M. 605; *Hammond v. Messenger*, 9 Sim. 327; *Gio Marino de Ghettoff v. London Assurance Co.* 4 Bro. Parl. Cas. 436; *Marshall on Ins.* 800; *Row v. Dawson*, 2 White & Tudor Lea. Cas. 612.

HAGARTY, J.—The declaration alleges that the plaintiff effected an insurance on his goods: that he afterwards sold them to Claxton, and assigned the policy on them with defendants' assent: that Claxton afterwards sold the goods to McMillan, who gave in part payment his notes endorsed by Linton for McMillan's accommodation, on a verbal agreement that the goods should be sold by McMillan and the proceeds of sales, as fast as they accrued and were received by McMillan, should be by him paid to Linton, and by him applied to pay the notes; and that, as part of the transaction, it was agreed that the policy should be assigned to Linton by Claxton, in trust to secure Linton against any loss or damage he might sustain from such endorsements, and to secure the payment of the notes, and to apply any moneys received to the payment of the notes, &c., and of any loss or damage, &c., and after payment as aforesaid, then in trust for McMillan; and the policy was, with defendants' written assent and knowledge of the facts, assigned by Claxton to Linton in trust as aforesaid. Averment of McMillan's continued interest in the goods up to the loss and Linton's continued liability as endorser to the amount insured, and that Linton by reason of the premises had an insurable interest, and that the plaintiff was interested in the policy as the trustee for



Linton and for McMillan. Averment of loss and non-payment either to plaintiff, McMillan, or Linton.

Demurrer, on the ground that neither plaintiff nor Linton had any insurable interest in the goods, nor McMillan any interest in the policy; that as far as the plaintiff's own interest is concerned, it amounts to nothing; he has parted with all property in the goods, and as the contract is one of indemnity, he can for his own benefit recover nothing, as at the time of the loss he had no interest.

McMillan was the party beneficially interested in the goods at the time of their destruction, but the policy was never assigned to him, and the declaration expressly shews that it was to his endorser, Linton, and not to him, the chose in action or contract with these defendants was transferred.

Insurance companies make special provision for the transfer of their policies on any change of ownership in the subject matter of the insurance, but the action at law must still, so long as we do not recognise in our courts of law the assignment of a chose in action, be always brought in the name of the original contractor with the company. The assent of the company to any transfer of the policy is made a condition of its continued validity, and the contract is in terms "to make good unto the plaintiff, his executors, administrators, or assigns, all such loss or damage as should happen by fire to the property."

If property be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented and expressed in the policy, and the names of the respective owners shall be set forth in the proofs of loss, with their respective interests therein; and persons sustaining loss shall give notice, verified by their oath, shewing the ownership of the property insured, the whole cash value, and their interest therein, and certificates that he or they have sustained loss, &c.; with power to the company to replace the things lost or take them at their appraised value, &c. &c.

Now the whole tenor of the contract is that defendants will insure the plaintiff from loss by fire on his goods, and that if he cease to be interested in them by sale, that all

the benefits of the contract of indemnity shall extend to his assignee, if defendants assent in writing to the assignment.

I think, therefore, that the plaintiff, by transferring all his interest in the goods, has no longer any claim for his own benefit, as he can shew no damage: that all claim for subsequent loss is at an end, except the policy have been regularly assigned (with assent), and then only in favor of the assignee of the policy, on whose behalf as a nominal plaintiff the party originally insured must sue. Therefore the real plaintiff is Linton, and it remains to be seen whether he from the time of the assignment down to the occurring of the loss had an insurable interest.

I think he had no property, right or lien, legal or equitable, in the goods themselves, nor any right or power to control them.

McMillan, the owner, had agreed to sell them and pay the proceeds to Linton, to pay off the notes which the latter had endorsed for McMillan's accommodation. On the statement in the declaration McMillan could have sold the goods how, when, and where he pleased, for cash or credit, &c. If therefore Linton had an insurable interest in the goods, it must follow, in the case of every person undertaking a liability for another, if that other promise him to sell any of his property real or personal and pay over the proceeds to be applied on the liability, that the surety, before any damage to him from the liability, forthwith acquires an insurable interest in the property so promised to be sold; and further, that before any such damage has arisen on the liability, if the property assured be burned the surety may, on what the law emphatically pronounces to be a mere contract of indemnity, receive from the underwriters the whole amount insured.

This of course opens two wide questions:—1st. Is it necessary to the validity of an insurance on goods that there should be an insurable interest; and, 2nd, If it be necessary, does such interest exist in the case before us.

In the very elaborate judgment of the late Sir *James Macaulay* in *Ogden v. The Montreal Insurance Company*, decided in 1853, (3 C. P. 514,) after a very full review of authorities legal and equitable, and a citation of the several

statutes, it is laid down, "It is quite clear that under one or other of these statutes the party insuring houses or goods, not adventured as merchandise, against loss by fire, must have an insurable interest therein." \* \* \*

"To warrant the insurance of goods against loss by fire, as well as against loss by dangers of navigation while on board ships or vessels, the insured must have an insurable interest therein, and which interest must be legal or equitable." p. 512.

I see no reason to question the correctness of this language on the numerous authorities there cited in support of it. In all the cases that I have read it seems assumed that the person assured must have an insurable interest in the subject of insurance. If he have not, he is met either by a plea denying his interest, or, as in the case of *The London and North Western R. Co. v. Glyn*, (1 E. & E. 652,) by a plea denying that the plaintiff had been damnified by the happening of the loss.

In *Goulstone v. The Royal Insurance Co.*, (1 F. & F. 276,) on a traverse of no interest in goods destroyed by fire, *Pollock, C. B.*, directed that a husband has an insurable interest in goods settled to his wife's separate use, they residing together and sharing in the use of the property; and that so had an insolvent in goods concealed from his creditors.

The latter point was also decided in *Marks v. Hamilton*, (7 Ex. 323.) *Alderson, B.*, says "The insolvent, having the possession of the property, is responsible for it to his assignees; then why may he not insure it?" *Pollock, C. B.*, "We are all clearly of opinion that, as he was in possession as the apparent owner, responsible to those who were the real owners, he had, under those circumstances, an insurable interest.

*Dalby v. Life Assurance Co.*, (15 C. B. 365,) which establishes the clear distinction between life policies and those on ships, goods, &c., explains the principle of how the latter class are mere contracts of indemnity to the assured for a loss sustained by one or more of the casualties insured against.

*The London and North Western R. W. Co. v. Glyn*, decides that carriers having the custody of goods may insure to their



full value, and not merely their own interest as carriers. The policy covered goods in a certain warehouse "their own and in trust as carriers." *Wightman, J.* says, "They must be considered as having insured the goods which they hold in trust as carriers for the benefit of the owners, for whom they will hold the amount recovered as trustees, after deducting what is due in respect of their own charges upon the goods." *Crompton, J.* "The loss is on property in which the plaintiffs are interested beneficially to the extent of their lien, and as to the residue of which they are trustees for the true owners."

*Waters et al. v. The Monarch Assurance Co.*, (5 E. & B. 870,) is relied on as decisive in the case last cited. It takes the same view. It was a case of wharfingers insuring goods of others in their stores. Lord *Campbell* says, "I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. \* \* The plaintiffs will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest." *Crompton, J.*, "They had an interest both in respect of their lien and of their responsibility to their bailor; \* \* they were persons interested in every particle of the goods."

There seems to be no doubt whatever as to the insurable interest of bailees of property. They have it under their control, and can recover the full value in trover or trespass against wrongdoers.

Assuming it to be law that there must be an insurable interest, it remains to consider the nature of *Linton's* interest.

It is not necessary here to quote the well known description of an insurable interest by *Lawrence, J.* in *Lucena v. Craufurd*, (2 Bos. & Pul. N. R. 302.) I am compelled to confess that the language used does not convey any clearly defined idea to my mind. Mr. *Arnould* quotes this definition, and also Mr. Justice *Story's* explanation; also Lord *Eldon's* cautious language, "I have in vain endeavoured, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property, or a right derivable out

of some contract about the property, which in either case may be lost on some contingency affecting the possession or enjoyment of the property."

Mr. Arnould says, "A vested interest *in possession* is not necessary to give the right of insuring. An expectancy, coupled with a *present existing title* to that out of which the expectancy arises is an insurable interest. Inchoate rights, founded on titles subsisting at the time of loss, are insurable interests: thus freight payable either on arrival of the goods, or under a charter party, is insurable by the *ship-owner*, provided his title to the freight has accrued at the time of loss, so that nothing but the intervention of the loss prevented him from earning it. Thus, again, profits expected to arise out of the sale or disposal of goods on their arrival are insurable *by the owner of the goods*, provided the goods are on board at the time of loss, and it can be shewn that but for the loss a profit would have been made on them." And he shews that bottomry loans are insurable by the lender where the recovery of the money depends on the risk of the voyage, &c. "It must be carefully borne in mind that, where the interest insured is the expectancy of profit or benefit to arise out of the safe arrival of some subject of insurance, a perfect and complete title to such subject must be subsisting in the assured at the time of loss." Arnould on Insurance, 2d. ed. vol. 1, p. 230-231.

In a case of *Heckman v. Isaac*, (6 L. T. Rep. N. S. 383,) a man had covenanted to keep insured two sets of premises demised to him by one instrument for five and sixteen years respectively, for a named sum, "during the said terms." After the first term had expired he contended that he was not bound to insure the premises in the expired term, as he had no insurable interest. The court held he was still bound by his covenant, and *Crompton, J.* adds "The covenant to insure would give an interest."

*Tasker v. Scott*, (6 Taunt. 234,) shews that the holder of a bill drawn by the captain of a ship on the owners for supplies in a foreign port, had an insurable interest in the vessel on the bill being refused acceptance, he being told by the captain to insure if the bill was not honoured, and the amount to be charged to his and the ship's account.

In *Lowry v. Bourdieu*, (Doug. 470,) the plaintiff advanced money to the captain of an East India ship on his common money bond, and effected insurance on the ship for the amount. Lord *Mansfield* says, "The plaintiffs say, 'We mean to game, but we give our reason for it. Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us.' It was a hedge. But they had no interest, for if the ship had been lost and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson."

In the case of *Sparkes v. Marshall*, (2 Bing. N. C. 761,) cited for the plaintiff, *Tindal*, C. J., after deciding that under all the circumstances the plaintiff had an insurable interest in oats lost at sea, as purchased by him, speaks thus, "We are not aware of any principle on which a change in the interest after the policy is effected, much less after the loss has happened, can be set up as an answer by the underwriters against a claim for such loss."

This case is referred to in *Powles v. Innes*, (11 M. & W. 10,) and Lord *Abinger* says, "That judgment must be taken to mean that the assignment of the goods makes no difference, provided the parties keep the contract of insurance alive for the benefit of the assignee." \* \* "It is a contract of indemnity only, and nobody can recover in respect of the loss who is not really interested. The policy is but a chose in action, and cannot pass merely by the assignment of the ship."

*Parke*, B.—"The plaintiff can only recover an indemnity. Then what has this party lost, if he has sold his interest in the ship, irrespective of the policy? \* \* Unless therefore there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser," &c., &c.

The form of the policy in either of these cases is not known to us, and in the case for our judgment there are provisions expressly avoiding the policy if assigned without



the underwriters' assent, and also expressly providing for the case of a change of ownership in the subject insured.

The best opinion that I can form on the whole case is that Linton had no insurable interest in the goods. His position may come within the not very precise language of some of the definitions of insurable interest, but an examination of the cases convinces me against his right.

In one sense he is no doubt interested in the goods, as their loss might seriously affect McMillan's solvency. His claim to be indemnified by McMillan remains however unaffected by the loss, and up to the time of its occurrence it is not shewn that he was actually damnified; and if McMillan from other sources retired the notes no damage might ever be sustained by Linton.

It is too late to suggest any doubt as to the right of a creditor to insure his debtor's life to the extent of the debt, although the death of the debtor does not destroy the remedy against his estate, but I cannot believe that the law allows the further step of insuring any of the debtor's chattels, because their loss might lessen his ability to pay the creditor.

I felt hesitation for some time on the question whether, as in any event the action has to be brought in the name of Davies, the original contractor, a recovery might not be allowed in his name, for the benefit (as it were) of all concerned, whether for Linton or McMillan. But the plaintiff cannot recover for himself, having both ceased to have any interest and having formally assigned the contract. I hardly see therefore how any recovery can be had except on account of Linton, to whom the contract is assigned, and who by the terms of the instrument steps into the place of the original person assured, and becomes plaintiff in every thing except the name of him who under our system of law has to be still nominally plaintiff.

If this chose in action were assignable, the action would, I think, clearly have to be in Linton's name. If McMillan sued, he would at once be met by the allegation that he is a stranger to the underwriters, who had never assented to an assignment to him, or to deal with him as assured by them.

I have felt some difficulty in understanding the meaning of one clause in the conditions.

"In case of claim for loss or damage on a policy assigned, *where there is no actual sale or transfer of the property insured*, proof of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made, otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease."

It is not easy to comprehend the exact bearing of this clause. If the policy have been assigned, but the property not actually sold or transferred; who is "*the insured?*" who is to make proof as if no assignment had been made? I can only read it as meaning that where there is no actual sale or transfer the proofs must be made by the original party insured, as if he had never made any assignment, the property still remaining his, or at all events not actually sold or transferred. It may perhaps be intended to cover a case where the property has been contracted to be sold on certain contingencies, or some interest is to be acquired therein by a third person on the happening of some event, and that in the meantime the policy is allowed to be assigned to him, but in the event of claim for loss, the underwriters require proof, &c., from the original assured, who still retains the property as if no assignment of policy had been made. This view cannot aid Linton, as Claxton ceased to have any interest, and McMillan never was a party insured by defendants.

All the conditions set out in the declaration seem based on the idea, that the underwriters always intend to deal with those who have title to and possession of the goods. The oaths as to "loss or damage on the subject insured" by the fire, the right to replace property, or goods destroyed or damaged, &c., &c., all point to this view.

On the whole, I think the defendants are entitled to our judgment.

DRAPER, C. J.—I concur in the opinion just delivered, that Linton had no insurable interest in the goods, which I have no doubt is essential. If a judgment had been recovered against McMillan, could not the execution creditor

have compelled the sale of these goods under his execution, and if Linton had no power to prevent this, how can it be said that he had an insurable interest?

MORRISON, J., concurred.

Judgment for defendants on demurrer.(a)

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BANK OF MONTREAL V. REYNOLDS ET AL.

*Amendment—C. L. P. A. sec. 222—Construction of—Usury—Variance.*

Under the C. L. P. A., sec. 222, all amendments necessary to determine the real question in controversy are imperative, without reference to the character of the action or defence. The only point for the court or a judge to determine is whether they are so necessary.

In an action on promissory notes, the defence set up being usury, *Held*, that variances in the amount stated as intended to be loaned and in the sum stated as the excess beyond legal interest, were material.

The learned judge at the trial refused to amend in these respects, desiring the opinion of the court. *Held*, that being an amendment necessary for the purpose of determining the real question in controversy between the parties, he was bound by the C. L. P. Act, sec. 222, to allow it. The amendment was therefore ordered, and a new trial granted.

The declaration was on two promissory notes, one dated the 21st of December, 1864, for \$800, payable at the Bank of Montreal at Toronto, at three months after date, made by defendant Reynolds to defendant Wilcox, or order, and endorsed by Wilcox to the plaintiffs; and the other of same date, payable also at three months, in Toronto, for \$600, made and endorsed as the first note. Both maker and endorser were sued.

The defence was usury.

At the trial, at Whitby, before *Adam Wilson, J.*, on going into evidence, there appeared a variance in the amount stated as intended to be loaned, and also in the sum stated as the excess beyond seven per cent. The learned judge was of opinion the variance was material, though both sums were laid under a *videlicet*, but he refused leave to amend, though saying that if his decision was not subject to review he should have granted it, but he desired the opinion of the court upon the question, and he doubted if the power should be exercised when the conse-

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(a) In *Davies v. The North British and Mercantile Assurance Co.*, in which the pleadings were the same, the Court of Common Pleas have given a similar judgment, *pro forma*, following this decision. It is understood that both cases will be carried to the Court of Appeal.



quences were so serious and the defence was one of strict right. The plaintiffs therefore had a verdict.

*Robert A. Harrison* obtained a rule calling on the plaintiffs to shew cause why there should not be a new trial on both points. 1st. The materiality of the variance, the sums being laid under a *videlicet*. 2nd. That the amendment was necessary for determining in the existing suit the real question in controversy between the parties, and that the statute made it imperative on the judge at *nisi prius* to grant it. He also moved in the alternative, that the amendment should be ordered by the court and a new trial be granted. He cited, as to the question of usury, *Masterman v. Cowrie*, 3 Camp. 488; *Carstairs v. Stein*, 4 M. & S. 192; *Lee qui tam v. Cass*, 1 Taunt. 511; *Doe Haughton v. King*, 11 M. & W. 333; *Derry v. Toll*, 5 Ex. 741. As to the variance, *Robson v. Fallows*, 3 Bing. N. C. 392; *Saxty v. Wilkin*, 11 M. & W. 622; *Farewell v. Dickenson*, 6 B. & C. 251; *Stanley v. Agnew*, 12 M. & W. 827; *Dimmock v. Sturla*, 14 M. & W. 758; *Ackermann v. Ehrensperger*, 16 M. & W. 99; *Bens v. Stover*, 12 U. C. R. 623; *Smith v. Trowsdale*, 3 E. & B. 83. As to the amendment, *Taylor v. Shaw*, 21 L. T. Rep. 58; *Ritchie v. VanGelder*, 9 Ex. 762; *Brennan v. Howard* 1 H. & N. 138; *St. Losky v. Green*, 9 C. B. N. S. 370, S. C., 3 L. T. Rep., N. S. 297; *Cordery v. Colvin*, 14 C. B. N. S. 374; *Doe Marriott v. Edwards*, 1 Moo. & Rob. 319; C. L. P. A. sec. 222, C. S. U. C. ch. 2, sec. 18, subsec. 2.

*M. C. Cameron*, Q. C., shewed cause, citing *Consol. Stats. C.*, ch. 58; *Fox v. Keeling*, 1 Moo. & Rob. 66, S. C., 2 A. & E. 670; *Lee qui tam v. Cass*, 1 Taunt, 511; *Robson v. Fallows*, 3 Bing, N. C. 392; *Fraser qui tam v. Thompson*, 1 U. C. R. 522; *Ritchie v. VanGelder*, 9 Ex. 762; *Hughes v. Bury*, 1 F. & F. 374; *The Times Fire Assurance Co. v. Hawke*, 28 L. J. Ex. 317; *McKenzie v. Vansickles*, 17 U. C. R. 226.

DRAPER, C. J., delivered the judgment of the court.

I have, though not without some doubt, arrived at the conclusion that the variances were material. The first, that

in the amount to be loaned, was part of the contract, which should be stated with all the certainty of which it is capable, and which must be within the knowledge of the defendant Reynolds. The other I have much more doubt about, for there is sufficient certainty of statement that the corrupt agreement was to take one-half per cent. above the rate allowed by the statute for the time the note had to run, and the variance as to the amount actually taken might with the less apparent reason be deemed material.

On the other question I am free from doubt. The 222nd section of the Common Law Procedure Act, (Consol. Stat. U. C., ch. 22,) enacts, that "The courts and every judge thereof, and any judge sitting at *Nisi Prius*, or for the trial of causes, *may*, at all times, amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court or judge seems fit, and *all such amendments* as may be necessary for the purpose of determining in the existing suit *the real question in controversy* between the parties *shall* be so made."

The 216th and 217th sections contain also provisions as to amendments of variances, less extensive, and left entirely as a matter of discretion to the court or the judge at *Nisi Prius*.

We must suppose, as by the language we find, that the Legislature meant by the 222nd section to extend the power of amendment, and this is very fully done by the first and enabling part of that section, and then follows a mandate, that "all such amendments," an expression large enough to include all that had been previously set forth, as should be necessary to determine the real question in controversy, *shall* be made.

The words "may" and "shall" so used in the same section, plainly to my mind convey, that amendments falling within the first part are discretionary, within the latter part that they are commanded. And the 2nd subsection of section 18 of the Interpretation Act, (Consol. Stat. U. C., ch. 2,) leaves no room for doubt, "The word

'shall' is to be construed as imperative, and the word 'may' as permissive."

The only point, therefore, for the court or a judge under this latter part of the 222nd section, is whether the amendment is necessary for the purpose stated. If it be, it is imperative to make it. The Legislature have relieved the court and judge from considering the character of the action or of the defence. They give a simple rule, the necessity of the amendment for the purpose of determining in the existing suit the real question in controversy.

I have no doubt therefore the amendment asked for should be made, and that the rule should be made absolute for that purpose, and that there be a new trial, the costs to abide the event, including the costs of this rule.

My brother *Hagarty* having had no opportunity of considering the case with us, takes no part in the judgment.

MORRISON, J., concurred with the Chief Justice.

Rule absolute.

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### THE QUEEN V. FARLEY.

*Coroner's Inquisition—Imputations—Refusal to quash—Entitling affidavits.*

A coroner's jury found the cause of a death into which they were inquiring to have been disease, adding that it was accelerated by an overdose of certain drugs taken in excess, and improperly compounded, prescribed and administered by one F. as a cholera preventative, and that F. was deserving of severe censure for the gross carelessness displayed by him in such compounding and prescribing.

This inquisition having been brought up by certiorari, granted on the application of F., the court refused to quash it, holding that the imputation which it contained, not amounting to any indictable offence, gave him no right to have it quashed, and that, under the circumstances, public justice did not require their interference.

*Quære*, whether the affidavits were properly entitled *The Queen, plaintiff, v. Robert Farley, defendant.*

*Robert A. Harrison* in Michaelmas Term obtained a rule calling upon the Attorney-General to shew cause why the inquisition returned to a writ of certiorari brought in and filed on making this motion, should not be quashed, on the following objections:—



1. That the inquisition is not on parchment or indented.
2. That the house or place where the said inquisition was had or taken is not shewn on the face of the inquisition.
3. That the jury impanelled and sworn do not appear to have been good and lawful men of the county in respect of which the coroner professed and was entitled to act.
4. That the inquisition appears to have been taken or made in whole or in part on the eleventh day of September last, which was a Sunday.
5. That numbers are expressed in the caption of the inquisition by figures, and not by words only.
6. That no distinct or substantial charge is contained in the inquisition.
7. That no offence in law is shewn in the inquisition.
8. That the time and place of the commission of the alleged offence, if any, is not sufficiently shewn in the inquisition.
9. That the inquisition does not sufficiently shew where Henry Hughes died.
10. That the allegations in the inquisition are not made with certainty.
11. That the charge, if any, in the inquisition, is not single.
12. That the inquisition contains no proper or legal conclusion.
13. That the inquisition contains no proper or legal attestation.
14. That a juror has set his mark to the inquisition, instead of subscribing his name.
15. That the mark of such juror to the inquisition is not attested.
16. That the information on which the coroner held the inquest was not received by him until after summoning the jury.
17. That during the progress of the inquiry the coroner arrested and removed one of the jurors empanelled and sworn to hold the inquiry.
18. That the coroner, after arresting and removing the juror last aforesaid, proceeded without empanelling or swearing a new jury.

19. That the coroner took evidence in the absence of a juryman empanelled and sworn to hold the inquiry.

This rule was drawn up on reading the original writ of certiorari, and the return and schedules thereto annexed, including the original inquisition, together with the affidavits on which said original writ was directed to issue, which by permission of the court were refiled.

The writ of certiorari was addressed to George S. Herod, Esquire, one of the coroners for the County of Wellington, and to John Juchereau Kingsmill, Esquire, County Crown Attorney for the same county. The return to it was made by Mr. Kingsmill alone. It was obtained on the following affidavits:

1st. Of Robert Farley (sworn 22nd Nov. 1864,) stating that one Henry Hughes died at the town of Guelph, on the 5th of September, 1864; that an inquest was thereupon held on his body by George S. Herod, a coroner, &c.: that such inquest was held on the 6th, 7th, 8th, 9th, 10th, and 11th days of September, 1864, and that the eleventh day was a Sunday: that the inquest was held professedly by the coroner on information on oath, (a copy being annexed,) and, as deponent believed, the coroner ordered the jury to be summoned before the information was laid, and drafted the information himself as well as the requisition on himself to hold the inquest, after he had issued his precept for summoning the jury: that one John T. Cunningham was sworn as one of the jury, and on the 5th day of the inquest the coroner, without any just cause, and while a witness was under examination, placed said Cunningham under arrest, and ordered him to be removed, and proceeded with the inquiry with the residue of the same jury: that the coroner took evidence in the absence of James Colson, another of the jurors sworn, (and who signed the inquisition): that the coroner and the jurors signed the inquisition (as deponent believes) on Sunday the 11th of September, 1864: that the coroner on the finding of the inquisition issued his warrant for the deponent's arrest on a charge of manslaughter, on which warrant the deponent was arrested and kept in custody about thirty hours: that at the assizes for the County of

Wellington, in October, 1864, a bill presented against the deponent for manslaughter of Henry Hughes was ignored by the grand jury.

2nd. Of Robert Oliver, junior, verifying the copies of the inquisition, and the papers connected therewith, returned by the coroner to the County Crown Attorney.

Among these papers were, 1st, the information of Margaret Hughes (sworn 6th Sept. 1864,) before a J. P. of the county, that she suspects and believes that the death of her husband, which took place the day before, was in some degree consequent on some mixture being taken by him as medicine, which was obtained at the store of R. Farley & Co., and from such belief she required an investigation. 2nd. A requisition signed by the said Margaret Hughes, and by two other persons, one of them a medical man, requiring, in accordance with the statute, the coroner to hold an inquest. The evidence as minuted by the coroner was also annexed. In the course of the evidence the coroner notes as follows: "At this stage of the proceedings I ordered Mr. Cunningham, one of the jury, out of the room, for his frequent interruption of the case, and upon my asking him to keep silence, and that I would give him an opportunity after I had got through with the witness of examining the same, he persistently refused."

The inquisition itself was as follows:—

Province of Canada,	}	An inquisition, indented,
County of Wellington,		
To wit:	}	taken for our sovereign lady
		the Queen, at the town of

Guelph, in the County of Wellington, the 6th, 7th, 8th, 9th, 10th, and 11th days of September, 1864, in the 28th year of the reign of our sovereign lady Queen Victoria, &c., before George S. Herod, gentleman, one of the coroners of our said lady the Queen for the said county, on view of the body of Henry Hughes then and there lying dead, upon the oaths of, &c., &c., (sixteen names) good and lawful men of the said town duly chosen, and who being then and there duly sworn and charged to enquire for our said lady the Queen when, where, how and after what manner the said Henry Hughes came to his death, do upon their oath say—The Jury empanelled to enquire into the cause of the death of Henry Hughes do find that the said Henry Hughes came to his



death from subacute inflammation of the stomach and bowels, superinduced by intemperate habits; further, that deceased's death was accelerated by an overdose of Liq. Ammonii fort., combined with other drugs, taken in excess by deceased, and improperly compounded, prescribed and administered by Robert Farley, Chymist and Druggist, of this town, as a cholera preventative. The jury further find that the said Robert Farley is deserving of severe censure for the gross carelessness displayed by him in compounding and prescribing the ammoniacal drug as aforesaid. And further, this jury regret that some restriction is not imposed by law to prevent the sale and prescription of drugs by incompetent persons.

Signed and sealed by the Coroner, and by the sixteen persons named in the body of the inquisition, one of them

his  
however signing thus, William x Hogan.  
mark.

*Freeman, Q. C.*, shewed cause during Hilary Term last, citing *Jervis on Coroners*, 293, 294, 296, 297; 2 *Saund.* 291: *Consol. Stats. C.*, ch. 9, secs. 18, 20; *Lai v. Stall*, 6 U. C. R. 506; *Wilt v. Lai*, 7 U. C. R. 535.

*Robert A. Harrison*, in support of the rule, cited *Jervis on Coroners*, 271, 272, 273, 276; *Rex v. Evett*, 6 B. & C. 247; *Regina v. The Coroner of Yorkshire*, 9 L. T. Rep. N. S. 424; *Rex v. Stukely*, 12 Mod. 493; *In re Culley*, 5 B. & Ad. 230; *The Queen v. Brownlow*, 11 A. & E. 126; *Regina v. West*, 10 L. J. M. C. 133.

DRAPER, C. J., delivered the judgment of the court.

It may be open to question whether the affidavits are properly entitled, "The Queen, plaintiff, v. Robert Farley, defendant. Such a style or title would certainly not arise from the fact that the court granted a writ of *certiorari* on Farley's application to bring up the inquisition, &c., nor that the rule called upon the Attorney-General to shew cause why the inquisition should not be quashed; nor, as seems to me, from the introduction of Farley's name unto the finding, which charges no criminal offence in general terms, nor any indictable offence against Farley particularly.

The jury have found the cause of Henry Hughes' death

to have been disease superinduced by intemperate habits. They add that death was accelerated by an overdose of certain drugs taken in excess by deceased, and improperly compounded, prescribed and administered by Robert Farley as a cholera preventative. It is not alleged that this compound was prescribed and administered to the deceased, and as far as the finding is concerned Farley may have known nothing of the deceased in the matter, the gross carelessness charged against Farley being the compounding and prescribing "the ammoniacal drug as aforesaid"—that is, prescribing to any person who purchased the compound as a cholera preventative, which in itself is not represented to be injurious, but to be so only "by an overdose taken in excess."

Looking at the case reported in 2 D & L. 29, it is to my mind clear that the finding by the coroner's jury, which casts a reproach on the conduct of Farley as having accelerated the death of Hughes, does not give him a *right* to have the inquisition quashed, and I do not think, using the words of Lord *Denman* (a), that "public justice is so far concerned" that we are called upon to interfere, although among the numerous irregularities and defects set out as grounds for the rule, there are some which most probably must be held fatal. During the argument, it appeared to me the principal object was to get rid of an obstacle which it was apprehended the inquisition might present to an action against the coroner. We see no reason in anything brought before us to treat this as sufficient to call for our interference, and we are not disposed, after reading the evidence given before the coroner, to go further than has been done in former cases in setting aside inquisitions.

We think the rule should be discharged.

Rule discharged.

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(a) In *In re Daws*, 8 A. & E. 937.

## KERR AND BROWN V. BRUNTON.

*Agreement—Illegality—Champerty.*

The plaintiffs having recovered judgment against B. & P., agreed with the defendant that if such judgment, or any portion of it, should be realized from property to be pointed out by him, he, defendant, should have one third of the amount so realized; "all costs that may be incurred in endeavouring to make the money to be payable by him if unsuccessful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided." Goods pointed out by defendant having been seized under the plaintiffs' execution were claimed, and on an interpleader issue were found to be the claimant's. The plaintiffs thereupon sued defendant on the agreement, for their costs of defence in the interpleader, &c., which they had been compelled to pay.

*Held*, that if such agreement extended to these costs, it was illegal as being contrary to public policy, if not within the definition of champerty; and if it did not so extend the plaintiffs could not recover. A nonsuit was therefore ordered.

DECLARATION.—That the plaintiffs, before the making of the defendant's promise hereinafter mentioned, had recovered a judgment of her Majesty's Court of Queen's Bench at Toronto against Levi Beemer and Wesley Pegg, for the sum of £332 18s. 5d. for their damages and costs, which judgment remained unsatisfied; and the defendant represented to the plaintiffs that he knew of certain goods and chattels of the said Levi Beemer which were liable to and could be levied under an execution, and agreed that if the plaintiffs would issue an execution directed to the sheriff of the County of Wentworth upon their said judgment, against the goods and chattels of the said Levi Beemer, that he would point out goods and chattels of the said Levi Beemer out of which the amount of the plaintiffs' said judgment could be levied and made. And the plaintiffs agreed with said defendant that if the amount of said judgment, or any part of it, should be realized from the goods and chattels of the said Levi Beemer so to be pointed out by the defendant, one-third part of the amount so realized should be paid to the defendant;—in consideration whereof the said defendant promised and agreed to and with the said plaintiffs, that he would pay all costs and expenses that might arise out of or be caused by such seizure of the goods so to be pointed out by the defendant, and all costs that might be caused thereby, or in endeavouring to make and levy the amount



of the said judgment, and that he would save the said plaintiffs harmless and keep them indemnified of, from and against all such costs and expenses. And the plaintiffs say that they did thereupon issue a writ of execution upon their said judgment, directed to the sheriff of the County of Wentworth, commanding him to cause to be made of the goods and chattels of the said defendants the amount recovered by their said judgment, and endorsed to levy the like amount, which was in due course delivered to the said sheriff for execution; and under and by virtue thereof the said sheriff did seize and take the goods and chattels so pointed out by the defendant as the goods and chattels of the said Levi Beemer. And the plaintiffs further say, that a claim was made to the said goods and chattels so seized by one John Beemer, as being his proper goods and chattels, of which the defendant had notice, whereupon the said sheriff, according to the form of the statute in such case made and provided, made application to a judge for a summons calling upon the said plaintiffs and the said John Beemer to shew cause why they should not appear and state the nature and particulars of their claims to the said goods and chattels so seized under the said writ and execution, or relinquish the same; and such proceedings were thereupon had, that by an order of the Honorable Mr. Justice *Hagarty*, one of the judges of the superior courts of law at Toronto, it was ordered, amongst other things, that upon payment of the appraised value of the goods so seized into court by the said John Brown within twenty days from the date of such order, or upon his giving security to the satisfaction of the master of the said court within the said period of twenty days for the payment of the same amount, according to the direction of any rule of court or judge's order to be made in the said cause, or for the forthcoming of the said goods or chattels so seized according to the directions of any rule of court or judge's order to be made in the said cause, the said sheriff should withdraw from the possession of the said goods and chattels; and further, that until such payment should be made or security given, the said sheriff should continue in possession of the said

goods and chattels, and that if such payments should not be made or such security given within the said period of twenty days, the said sheriff might sell the said goods and chattels and pay the proceeds into court; and that the plaintiffs and the said John Beemer should proceed to the trial of an issue in the said court, and that the question to be tried should be, whether the said goods so seized by the said sheriff and claimed by the said John Beemer were at the time of the delivery of the said writ to the said sheriff to be executed the property of the said John Beemer as against the said plaintiffs.

And the plaintiffs further say that the said John Beemer did not make the payment or give the security according to the terms of the said order; and the said sheriff did proceed to a sale of the said goods in the terms thereof, of all which the defendant had due notice.

And the plaintiffs further say that the said plaintiffs and the said John Beemer did proceed to the trial of an issue in terms of the said order, of all which the defendant had notice, and a verdict was therein rendered in favor of the said John Beemer against the said plaintiffs; and an order was afterwards made by the Honorable Mr. Justice *John Wilson*, that the said plaintiffs should pay to the said John Beemer his costs of and attending the claim made by him to the said goods, and of the said interpleader order, the costs of the sheriff of the County of Wentworth of obtaining said interpleader order, and the costs of the issue tried thereunder and of the proceedings therein and incidental thereto, and the possession money, charges and expenses of the said sheriff in seizing, keeping and selling the said goods and chattels. And the plaintiffs say that the said defendant did not keep them harmless and indemnified of, from and against the said costs and expenses, but, on the contrary, they were obliged to pay and did pay the said several sums of money so ordered to be paid, amounting together to the sum of £100, and they paid a further large sum of money, amounting to £50, for their costs of defence in the said interpleader issue, of which the said defendant had notice, but failed to pay the same, or any part thereof,

or to save harmless or keep indemnified the plaintiffs therefrom.

The defendant pleaded non assumpsit.

The case was tried at the last assizes, at Hamilton, before *Draper, C. J.*

The contract, which was written in the docket of the plaintiffs' attorney in the suit against Beemer and Wesley, was proved to be as follows:

"It is agreed that if the amount of the above judgment, or any portion of it, is realized from property to be pointed out by the undersigned, W. Y. Brunton, one-third of the amount so realized is to be paid to him. All costs that may be incurred in endeavoring to make the money to be payable by him, if unsuccessful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided."

(Signed,)

W. Y. BRUNTON,  
KERR, BROWN & Co.

It was proved that defendant told the plaintiffs' attorney that the goods were at Beemer's store. They were then seized and claimed by John Beemer, and were found to be his on trial by jury. Defendant was a witness on the trial. He told plaintiffs the goods in Levi Beemer's store were liable to the plaintiffs' execution, and wrote several letters to them after the seizure. Defendant knew the goods claimed by John Beemer were the goods seized, and he assisted in getting up the now plaintiffs' defence. One witness said that defendant would only contest the goods claimed by John Beemer.

It was objected that the agreement was not legal. Leave was reserved to move for a nonsuit, and the plaintiffs had a verdict for £131.

*Robinson, Q. C.*, obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the ground that the agreement proved was illegal and void for champerty and maintenance, and as being contrary to public policy. He cited *Stanley v. Jones*, 7 Bing. 377: *Sprye v. Porter*, 7 E. & B. 58, 76, 80; *Smith's Manual of Common Law*, 49.

*Burton, Q. C.*, shewed cause, citing *Hawk, P. C.*, 7th ed.



ch. 83, sec. 38, ch. 84, secs. 15, 18, 19, 20; *Stevens v. Bagwell*, 15 Ves. 139; *Wood v. Downes*, 18 Ves. 120; *Findon v. Parker*, 11 M. & W. 675.

MORRISON, J., read the following judgment prepared by HAGARTY, J.—The argument for the plaintiffs was that no suit was pending about any property, nor was it binding on the plaintiffs to bring any suit: that the intention might be or was merely that defendants would point out property liable to the execution, which could be probably obtained without suit by the sheriff, and that the costs spoken of were merely the costs of any execution process on the judgment, sheriff's fees, &c.; and that therefore the contract is not open to any objection as to illegality.

This argument seems fatal to the plaintiffs' position. Assuming it to be a true representation of the contract, it is difficult to see how the defendant can be liable for the heavy costs of the interpleader suit, which resulted from the plaintiffs directing the sheriff to seize the goods claimed by John Beemer. According to this suggestion defendant never contracted to pay any such costs, and his agreement did not extend thereto. To make defendant liable the plaintiffs must, I think, contend that these costs come clearly within the scope of the contract, which must be construed as wide enough to cover the costs of such a proceeding. It must either be an agreement binding defendant to pay the costs of a litigation such as has arisen respecting these goods, or defendant is not liable therefor.

It seems a fair test to introduce into it words like these: "All costs which the plaintiffs may incur in any suit caused by or arising out of their attempt to realize their judgment out of the goods pointed out by defendant, brought by any person claiming property in said goods, if unsuccessful, to be paid by the defendant."

This is simply *expressing* in the contract the terms which the plaintiffs by bringing this action insist are to be *implied* from it. With the addition of these words, would such a contract be illegal?

We do not see any practical difference between the case

of a plaintiff having a judgment against his debtor, and looking for assets to satisfy it, and that of a man seeking for a quantity of property of his own which he had lost.

In the latter case a stranger comes forward and says, "I can point out where some of your property is. If through my doing so you can recover all or any of it, you shall give one-third to me, and if you have a law suit with any one contesting your right to it, if you be unsuccessful I will pay all the costs incurred by you."

We have a strong impression that such a bargain, if not coming within the not very precise language of the definitions of champerty, is illegal, as being opposed to public policy and the due administration of justice. It is at least the interference of a stranger in a matter that does not concern him, and an agreement on his part to bear the costs of another man's litigation if unsuccessful, on condition that if successful the proceeds realized shall be shared between them.

As *Tindal, C. J.* says in *Stanley v. Jones*, (7 Bing. 378,) "If there is any difference between this contract and direct champerty, it appears to us to be strongly against the legality of this contract." It is not necessary to state all the peculiar facts of this latter case. There the plaintiff had agreed to furnish evidence respecting a matter in dispute between third persons, and, as expressed in the judgment, "to purchase from one of the contending parties at the price of the evidence which he so possesses or can procure, an eighth part of the sum of money which shall be recovered by means of the production of that very evidence. "We all agree," said the Chief Justice, "in thinking such an agreement cannot be enforced in a court of law. The offence of champerty is defined in the old books to be, the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it \* \* The offence consisted in purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation \* \* The plaintiff does purchase an interest in the subject matter of dispute, not in terms indeed, but in substance and effect, as he bargains distinctly for a share of the sum to be recovered. He does not indeed stipulate that

he is to furnish money for the carrying on the suit, or that he is to carry it on himself, but he stipulates that 'he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant.' "

It is to be borne in mind that no suit was pending in this case, and it was quite possible that on the information and evidence furnished and to be furnished by plaintiffs, the defendant might without suit recover the moneys said to be due to him.

Lord *Eldon* observed in *Wood v. Downes*, (18 Vesey, 125,) "It has been said no one can be guilty of it" (viz. maintenance) "in respect of any money given to another before any suit is actually commenced; yet if it plainly appear that it was given merely with a design to assist him in the prosecution or defence of an intended suit which afterwards is actually brought, surely it is as great a misdemeanor in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit, though perhaps it may not in strictness come under the notion of maintenance."

In *Sprye et al. v. Porter*, (7 E. & B. 77,) the same principles are fully recognised. One Townley had died intestate and apparently without traceable kindred, and administration had been granted to the solicitor to the Treasury for the benefit of the Queen. Defendant was ignorant of his being related to Townley. A plea set out these facts, and that the plaintiffs represented to defendant that they could supply such evidence and information, in case it should become necessary that proceedings should be taken at law or in equity for the recovery, that through such information and evidence the defendant might successfully recover the property, and defendant agreed with the plaintiffs to pay each one-fifth of the property so recovered, the plaintiffs agreeing to give and supply the evidence and information. Lord *Campbell*, after stating the facts, says, "Here we have *maintenance* in its worst aspect. The plaintiff and Rosaz, entire strangers to the property, which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with



him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one-fifth of the property, when so recovered; and, unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney or to advance money to carry on the litigation, but they are to supply that upon which the event of the suit must depend, *evidence*; and they are to supply it of such a nature and in such quantity as to insure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal; and *Stanley v. Jones* is an express authority to that effect."

In this case last cited, if the bargain had been that if the plaintiff and Rosaz would point out to defendant how he was related to Townley, of which he was ignorant, that he should give them each one-fifth of all he recovered of Townley's estate; and that they would pay and indemnify him against all costs of any unsuccessful litigation in which he might engage for such recovery, I think it would be just as illegal as if it had the further term in the contract of supplying evidence.

There is no very substantial distinction between agreeing to "point out" to a man property to which he is entitled, of the existence of which and of his rights thereto he is wholly ignorant, and agreeing to furnish him with evidence to substantiate his right. In the *Townley* case, if the plaintiff had agreed to "point out" to the defendant the property of Townley, to which he was entitled, the merely saying to him, "You are entitled to that property," would be of little avail, without furnishing him with information as to how he was so entitled.

Upon the principles enunciated in these cases, we consider such a contract as the defendant and plaintiffs here must have

entered into to warrant a recovery in this case, as incapable of being upheld in a court of justice.

The plaintiffs are in this dilemma:—If their bargain be an innocent one, as they contend it was, then defendant never made himself responsible for the costs now sought to be recovered; if he did so make himself liable, then in our judgment the contract is illegal, for the reasons assigned.

Rule absolute for nonsuit.

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### OLIPHANT V. LESLIE AND BRODDY.

*Trespass—Interpleader in Division Court—Informal adjudication—Evidence of—Evidence of trespass—Notice of action—Demand of warrant, under sec. 195, D. C. Act.*

In an action of trespass against a Division Court bailiff and one B. for entering plaintiff's close and taking goods, defendants pleaded that one H. having recovered a judgment in a Division Court against O., the plaintiff's mother, and the goods in question having been seized under an execution issued thereon, the plaintiff claimed them, whereupon the bailiff obtained an interpleader summons, on which the judge, after hearing the parties, adjudged that the goods were the property of the said execution creditor and liable to said execution. The interpleader summons was produced, with a minute endorsed by the judge adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff called witnesses, who swore that the judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days.

*Held*, that the minute of adjudication and order were conclusive to shew that the summons was not enlarged, and that the jury should have been so directed.

*Held*, also, that although the minute was informal, in adjudging that the goods were the property of the execution creditor, instead of saying that they were the claimant's, or not the execution debtor's, yet it was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff.

Defendant B. having declared that he owned the debt, and that the execution was issued at his instance, and having appeared for the execution creditor on the interpleader summons. *Held*, sufficient evidence to go to the jury of his being a joint trespasser.

The notice of action stated a trespass on the 18th of October and on divers other days. The goods were seized on the 18th, but returned, and again seized on the 18th of November and sold. *Held*, that the notice was sufficient.

*Held*, also, that no demand of perusal and copy of warrant from the bailiff was necessary, following *Sayers v. Findlay*, 12 U. C. R. 155.

TRESPASS for breaking and entering the plaintiff's close, being the west half of lot 27, in the 3rd concession south

of Dundas street, in the Township of Toronto, on the 18th of October, 1864, and on divers other days, and taking two horses and harness of the plaintiff, and selling and converting the same, &c.

Defendant Leslie pleaded not guilty by statute.—Consol. Stat. U. C., ch. 19, secs. 193, 4, 5, 6, 7 & 8; and ch. 126, secs. 1, 2, 9, 10, 11, 12, 16, 20.

Defendant Broddy pleaded not guilty, by the same statutes.

Both defendants pleaded (except as to the harness) that Leslie was before and at the time, &c., bailiff of a division court, at which court, before the said time, &c., one Hull, on the 1st of May, 1858, recovered against Rebecca Oliphant £5 9s. 3d. debt, and 12s. 4d. costs: that after the issuing of certain writs of execution, which were not satisfied, and the judgment remaining in full force, Hull, by defendant Broddy his agent, procured a pluries writ of execution against the goods of Rebecca Oliphant, dated the 10th of October, 1864, directed to the defendant Leslie, commanding him to levy the said debt, with interest, costs, &c.; upon which writ defendant Leslie entered upon the said close of the plaintiff and seized the said horses, being the goods of Rebecca Oliphant, doing no unnecessary damage; whereupon the plaintiff claimed the horses, and defendant Leslie obtained an interpleader summons, and afterwards the judge of the court, having heard the plaintiff and the defendant Broddy, who appeared on behalf of the execution creditor, adjudged that the horses were the property of the "said execution creditor," and liable to the said execution; and defendant Leslie afterwards duly levied by sale of one of the horses the amount due on the judgment—which are the alleged trespasses. On these pleas the plaintiff took issue.

The trial took place at the assizes for York and Peel, in May, 1865, before *John Wilson, J.*

It was proved that the defendant Leslie, on the 18th of October, 1864, seized the horses in question on the lot mentioned in the declaration. Evidence of plaintiff being the owner was given. The horses were not then taken away, but on the 18th of November following, Leslie, accom-



panied by another man, came again and took both horses away. Leslie stated he seized the horses for a debt of Hull's, and was told the horses were the plaintiff's. The plaintiff's father had been dead eighteen years: his widow and children continued on the place. Plaintiff was about thirty years old, and worked the farm since 1860; he was "head outside;" his "mother and the women inside." The debt to Hull was incurred by the mother. One of the horses was sold. It was sworn to have been worth from \$80 to \$100; the other was returned.

For the defence a copy of the proceedings in the division court was put in, in a suit Charles Hull v. Rebecca Oliphant, in which judgment was given for the plaintiff in May, 1858. Successive executions were issued, and on the 30th of November, 1864, a return of money made in full was made. At the bottom was written, under date of 20th December, "Received \$17. W. Broddy."

On the 26th of October, 1864, the defendant Leslie obtained an interpleader summons, calling on Aaron Oliphant, junior, the claimant, to appear on the 15th of November, 1864, at the division court therein specified, touching a claim made by him to these horses seized under process against the goods of Rebecca Oliphant. This summons was entitled between Aaron Oliphant, junior, plaintiff, and Charles Hull, defendant. On the 15th of November the now plaintiff applied to the judge to postpone the hearing of the interpleader summons, and the delay was granted on payment of costs. The plaintiff said he could not pay them, and then the judge made a minute on the back of the interpleader summons in these words, "Adjudged that the goods mentioned in the interpleader summons, that is to say, the horses, are the property of Charles Hull, execution creditor. Ordered that the costs of this proceeding be paid by the claimant in fifteen days. Dated this 15th day of November, 1864." (Signed) J. B., judge.

The execution on which the horses were seized was issued at the instance of the defendant Broddy, and he acted in the interpleader matter asserting Hull's claim, and the plaintiff's uncle swore that Broddy told him there, at

the division court, that he owned the debt; and this witness also swore that he was attending that court on behalf of the plaintiff, and that the judge gave the plaintiff fifteen days to pay the costs of postponing the hearing of the interpleader summons, and that it was not tried afterwards.

This witness also served the notices of action, which were similar in form to the declaration, charging the trespass on the 18th of October, and on divers other days, &c., signed by the plaintiff himself, and endorsed as follows: "This notice is given by Aaron Oliphant the younger, who resides on the west half of lot number twenty-seven, in the third concession south of Dundas street, in the township of Toronto, in the county of Peel, whose attorney is Samuel Bickerton Harman, whose office is in the Romain Buildings, on King street, in the city of Toronto, in the County of York."

For the defendant it was objected, that there was no notice as to the seizure in November, and that the endorsement on the notice was insufficient. It was served by the agent of the plaintiff (his uncle), and his name, &c., was not endorsed upon it. The objection was overruled.

In reply, Rebecca Oliphant, the plaintiff's mother, said she knew Hull, who had a claim against her, and Dr. Dixie had an execution: that she paid the bailiff when the receipt was given: that she paid Dixie's to the clerk of the court in his office, \$8, in 1854: that the plaintiff's name was Charles Dixie Hull: that she paid all that the bailiff Armstrong claimed. The receipt spoken of by this witness was sworn to by a sister of the plaintiff, who said she saw her mother pay the money to Armstrong, who said nothing about an execution of Dr. Dixie's: that she saw \$25 counted and paid. The receipt was in these words: the parts in italics being written with a lead pencil.

"*Streetsville, May 1858. Received from Reb. Oliphant the sum of six pounds five shillings and — pence, on account. Dixie Hull vs. Oliphant.*" (Signed) "*H. Armstrong.*"

The clerk of the division court proved this receipt was in the handwriting of the former bailiff, Armstrong, who was dismissed in November, 1860, for alleged defalcations: that

on the 1st of May, 1858, Dr. Dixie did recover a judgment in the division court against Mrs. Oliphant for \$6 and \$2 costs, and that in June Dixie's execution was returned paid in full by Armstrong, but nothing was ever returned as paid on Hull's execution. On being re-called he said he never heard Hull called by any other name than "David," and he denied that Mrs. Oliphant paid him \$8 in 1854, as she had sworn. The learned judge of the county court was the last witness, and said that he never allowed fifteen days for payment of costs for putting off a trial.

The jury found for the plaintiff, damages \$100.

*Robert A. Harrison* obtained a rule calling upon the plaintiff to shew cause why there should not be a new trial, for misdirection, in ruling that there was evidence to connect Broddy with the trespass in the declaration mentioned; also, that the action was maintainable against Leslie and Broddy, the former a bailiff of a division court, and the latter acting in aid of Leslie, although no written demand of perusal and copy of the warrant was, under section 195, Con. Stat. U. C., ch. 19, served on Leslie, or left at his residence before action; also, in ruling that the notice of action served was in compliance with the statute, and sufficient to entitle the plaintiff to recover in respect of the seizure on the 18th of November, 1864; and that defendants' special plea of estoppel was not proved; also, for refusing to tell the jury that this special plea was proved, and that if any amount was due on Hull's judgment against Rebecca Oliphant at the time the execution issued, the writ was regular. Or why a new trial should not be granted, the verdict being contrary to law: that the seizure in respect of which the plaintiff recovered was that in November, although no notice of action for that seizure was served; and that the weight of evidence was greatly in favor of the defendants' special plea. He cited *Haacke v. Adamson*, 14 C. P. 201; *Martins v. Upcher*, 3 Q. B. 662; *Breese v. Jerdein*, 2 G. & D. 720, note; *Croukhite v. Sommerville*, 3 U. C. R. 129.

*J. H. Cameron*, Q. C., shewed cause, and cited *Sayers v. Findlay*, 12 U. C. R. 155.



DRAPER, C. J., delivered the judgement of the court.

With regard to the special plea which the defendants' counsel relies upon as an estoppel, there can, I apprehend, be no doubt that the facts out of which the estoppel is assumed to arise are properly put in issue, and being in issue require to be proved, and may be contested in evidence. If the fact were properly established, that the judge had on the interpleader summons adjudicated upon the plaintiff's claim, determining that he had no claim, and had made an order between the parties to the summons, such order would be final and conclusive between those parties, and could not be controverted between them. The only allegation in the plea, on which the evidence was contradictory, is that the judge decided that the horses were the property of the execution creditor, and were liable to the execution. On the part of the plaintiff, evidence was given to shew that the judge did not adjudicate upon the interpleader summons, but that, at the plaintiff's request, he put it off on payment by the plaintiff of the costs, and that he gave the plaintiff fifteen days to pay those costs, since which no proceeding has been taken in the matter of the interpleader summons. On the other side, the judge himself was called, and stated that he never did postpone the payment of the costs on an application for delay; and a minute was proved, endorsed by the judge on the interpleader summons, bearing date the 15th of November, 1864, adjudging that the horses are the property of Charles Hull, execution creditor, and ordering that "the costs of this proceeding be paid by the claimant in fifteen days."

I look upon this minute of adjudication and order as conclusive of the fact that the interpleader summons was not enlarged or put off. The terms of the minute, however, create a difficulty. In adjudging that the horses were the property of Charles Hull, the execution creditor, the learned judge was deciding a question which I should imagine could not have been, or which at least is not shewn to have been raised before him. If the intention was to decide against the claimant, and no other intention is to be inferred from what appears, the more obvious course would

have been to say that the horses were not the claimant's property, or that they were the property of Rebecca Oliphant. Still the question arose, upon a seizure of the horses made by the defendant Leslie, on an execution issued by Hull against the goods of Rebecca Oliphant, and the plaintiff claimed these horses as his. The interpleader summons was issued for the protection of the bailiff, and the adjudication was against the plaintiff's claim, although in a form not regular; and unless we must hold that the proceeding is nugatory by reason of the informal shape of the adjudication, the bailiff is entitled to the protection the statute intended to give him. I think we ought to look at the substance of the order as dismissing the plaintiff's claim; and while I entirely agree with the learned judge in directing that the adjudication, if proved, was a bar to the plaintiff in this action, I think the jury should have been told that the proof of the minute of adjudication, endorsed at the time, was the best evidence, and conclusive in favor of the defence.

For this reason I think there should be a new trial without costs.

There are two other points taken in the rule, and which appear by the learned judge's report to have been raised at the trial. First, as to the evidence to shew that Broddy was a joint trespasser. I think his own declaration that he owned the debt, and that this execution was issued at his instance, enough to go to the jury upon this point, and his taking part in the interpleader summons before the judge tends to corroborate the inference arising from such evidence.

Then as to the notice of action, the objection amounts to this:—The notice refers to an act of trespass on the 18th of October, 1864, and on divers other days. An act of trespass on the 18th of October was proved, but the sale of one of the horses, also mentioned in the notice, was not made until after the 18th of November, on which day the horses were taken away from the plaintiff's farm, having either been returned there, or allowed to remain there after the 18th of October. The defendants insist they should

have had a distinct notice of this latter act on the 18th of November, since on it and on the sale which followed it the plaintiff's claim to damages was substantially founded.

On a consideration of authorities, I am of opinion that the notice is sufficient. A great many decisions are referred to in the cases cited, of *Martins v. Upcher*, and *Breese v. Jerdein*, (4 Q. B. 585,) as well as in *Prickett v. Gratrex*, (8 Q. B. 1020.) In *Gimbert v. Coyney*, (McCl. & Y. 469,) the notice stated that the defendant on the 16th of August, 1824, and on divers other days and times between that day and the day of the date of the notice, broke and entered, &c. It was objected that the notice was capable of comprehending as many causes of action as there were days between the two days named. In giving judgment, the Lord Chief Baron said, the Court were of opinion that due notice was given pursuant to the Act 24 Geo. II., ch. 44, which required that in the notice shall be clearly and explicitly contained the cause of action which the party hath, and that, notwithstanding that the notice included more than was necessary, it expressed clearly and explicitly enough the real cause of action, and could not have misled or imposed any difficulty on the defendants as to the tender of amends they might think fit to make; and it was therefore sufficient.

Our statute contains similar language to that in 24 Geo. II., and the remarks of the Lord Chief Baron will be equally applicable. I think the notice in this case explicitly draws the defendants' attention to the plaintiff's whole cause of action, commencing with the seizure on the 18th of October, and followed by continuous acts of trespass terminating with the sale.

I will only add, that I think the objection founded upon the 195th section of the Division Courts Act, is answered by the case cited of *Sayers v. Findlay*, (12 U. C. R. 155.)

Rule absolute.



## CRAIG ET AL V. CORCORAN.

*New Trial—Too small damages.*

Action for excess of advances on defendant's wheat, consigned to plaintiffs for sale, above the proceeds. Verdict for plaintiffs, but for less than such excess. New trial granted for smallness of damages, costs to abide the event, *i.e.*, the event of plaintiffs recovering more than by the verdict set aside—following *Jones v. McDowell*, 12 U. C. R. 214.

This case is reported in 22 U. C. R. 441, on the rule for a new trial, which was granted on the application of the defendant, costs to abide the event. The facts are fully stated in the former report, and the evidence at the last trial was substantially the same, with the addition of testimony taken under a commission in England, to supply the proof which the court held to be essential.

The action was brought to recover the excess of advances made to defendant by the plaintiffs upon his wheat, in their hands for sale, above the proceeds of such wheat, and the jury at the first trial gave a verdict for the full amount advanced, with interest, \$2477.

At the last assizes for Guelph, before *Hagarty, J.*, the cause was tried again, and resulted in a verdict for the plaintiffs, with one thousand dollars damages.

*C. Robinson, Q. C.*, obtained a rule to shew cause why a new trial should not be granted, on the ground that the verdict was for less than the plaintiffs were entitled to recover, the damages being substantially a mere matter of calculation, and that the evidence clearly entitled the plaintiffs to the full amount advanced by them upon the wheat in question, above the sum received by the sale of said wheat, with interest. He cited *Jones v. McDowell*, 12 U. C. R. 214; *Wilson v. Hicks*, 26 L. J. Ex. 242; *Hall v. Poyser*, 13 M. & W. 600.

*M. C. Cameron, Q. C.*, shewed cause.

DRAPER, C. J., delivered the judgment of the court.

The learned judge reports that the evidence fully warranted a verdict for the plaintiffs, and that nothing was

proved which would entitle the plaintiffs to less than they had recovered on the former trial.

We only hesitated as to the question of costs, for we were all of one mind at the close of the argument, that there must be a new trial. The jury seem, for some reason which we do not gather from the evidence, to have designed to allow the defendant to retain more than twelve hundred dollars of the money advanced by the plaintiffs to him. Whatever their reason may have been, it is so plainly unjust that the court cannot sustain the verdict.

As to costs, the case of *Jones v. McDowell* is so precisely similar in principle, that we think we may well follow it, and order a new trial, with costs to abide the event—that is, the event of the plaintiffs recovering more than by the verdict now set aside.

Rule absolute.

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### GAMBLE V. THE GREAT WESTERN RAILWAY COMPANY.

#### *Railway—Liability for loss of luggage.*

Plaintiff, travelling on a first-class passenger ticket on defendants' railway, from Chatham to Toronto, had a travelling bag, which he took with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car, in order to retain the place, and on his return from the refreshment room it was gone.

*Held*, that defendants were liable for the loss.

*Morrison, J.*, dissented, on the ground that, under the system of checking luggage adopted in this country, defendants' liability should be confined to articles checked.

*Per Draper, C. J.*—That system should be considered as an additional precaution adopted by the defendants for their own security, not as affecting their liability.

This was a case stated for the opinion of the court, under the C. L. P. A., as follows:—

The defendants are common carriers, for the carriage of passengers, luggage and goods.

In the month of October last the plaintiff was a passenger on the railway of the defendants, having purchased at their station, in the town of Chatham, a first-class passenger

ticket, which entitled him and his luggage to be carried from Chatham to Toronto, but the defendants not thereby assuming a higher responsibility in respect of such luggage than attaches to carriers of passengers having luggage with them—meaning to distinguish such responsibility, if it exists in law, from the responsibility of common carriers for goods.

The plaintiff had with him, amongst other luggage, an enamelled travelling bag, containing the usual articles of a dressing-case, wearing apparel, and other effects of the plaintiff, of the value of twenty pounds.

All these articles of luggage were taken by the plaintiff into the passenger car in which he took a seat for the journey he was about to make. He did not offer the travelling bag to the porters of the defendants to be checked. No servant of the defendants presented himself to take charge of the same, nor was any notice given that the defendants required the same to be checked.

At the London station of the defendants the train stopped for a short time to enable passengers to obtain refreshment, and the plaintiff, as is usual with passengers, in order to retain their seats, placed the travelling bag in the seat where he had been sitting, and went out to the refreshment room. Upon the plaintiff returning shortly afterwards to his seat in the car, the travelling bag, but no other portion of the plaintiff's luggage, was missing, and has not since been found, although the plaintiff forthwith reported the loss to the conductor of the train, and also to the station master at the London station.

The question for the opinion of the court is whether, under the facts above stated, the defendants are liable for the loss of the travelling bag.

If the court be of opinion that the defendants are liable, then judgment to be entered for the plaintiff for twenty pounds and costs of suit.

But if the court shall be of opinion that the defendants are not liable, then judgment of non-suit to be entered against the plaintiff, with costs of suit.

*G. D'Arcy Boulton* for the plaintiff, cited *Richards v. The London, Brighton, and South Coast Railway*, 7 C. B. 839; *Butcher v. The London and South Western Railway Company*, 16 C. B. 13; *The Great Northern Railway Company v. Shepherd*, 8 Ex. 30; *Shaw v. The Grand Trunk Railway Company*, 7 C. P. 493. (*Hagarty, J.*, referred to *Stewart v. London and North Western Railway Co.*, 10 L. T. Rep. N. S. 302.)



*Irving, Q. C.*, contra, cited *Powell on Carriers*, 2d Ed. 42, 56; *Chitty and Temple on Carriers*, 285, 289; *Towers v. The Utica and Schenectady R. W. Co.*, 7 Hill 47; *Great Western R. W. v. Goodman*, 12 C. B. 313.

DRAPER, C. J., read the following judgment, prepared by

HAGARTY, J.—The case states that defendants are common carriers of passengers, luggage and goods, and plaintiff purchased a ticket which entitled him to be carried with his luggage from Chatham to Toronto, but the defendants (as the case states) did not thereby assume a higher responsibility in respect of such luggage than attaches to carriers of passengers having luggage with them—meaning to distinguish such responsibility, if it exist in law, from the responsibility of common carriers of goods.

The plaintiff had with him a travelling bag, containing ordinary articles for a traveller's personal use, and placed it on the seat beside him, not offering it to be checked, nor being asked to have it checked as baggage, nor any notice that it should be checked being given to him. He left the carriage for a few minutes at a refreshment station, and on his return to his seat the bag was missing, and has not since been found.

The case is stated without pleadings, and no question is raised as to there being any thing unusual or against the defendants' rules or practice in the plaintiff or any other passenger placing an article like a travelling bag beside him in the carriage. He was entitled under the contract of carriage to be carried from Chatham to Toronto by defendants, *with his luggage*, of which the bag was a part.

It is not easy to understand how, on such a state of facts, the defendants, as carriers, are not responsible for the safe carriage of this passenger's luggage. There is no suggestion of any personal neglect or violation of any known rule or course of dealing on the plaintiff's part. He was received by defendants in their train in the ordinary way. His bag is placed near him, as far as we are told, not in any improper or unusual place. During the transit he leaves the train, with other passengers, for refreshment, in a manner permitted or at least not objected to by defendants,

and on returning to his seat his bag is missing. We cannot see how defendants can escape liability.

In *Richards v. The London, Brighton, and South Coast Railway Co.*, (7 C. B. 839,) the plaintiff came to the train in a cab, and the driver, without any communication with defendants' servants, placed her dressing-case under her seat in the carriage; her other luggage was taken and weighed by the defendants' porters. On arrival the porters carried her luggage, consisting of many articles, from the carriage to a coach, telling her servant that they would see to her things. On reaching her residence it was, for the first time, discovered that the dressing-case was lost. The defendants insisted that this article had never come into their custody. The jury found that they had received it to be carried.

The court held the defendants liable. *Wilde*, C. J., (a judge peculiarly well versed in all such common law questions) adds "The fact of the dressing-case being placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion, makes no difference." *Cresswell*, J., says, "There was abundant evidence to shew that the dressing-case in question came into defendants' custody under such circumstances as to make them responsible for its safe conveyance and delivery." *Williams*, J., says, "It was in their custody as common carriers at the time of the loss."

Much of the contention of defendants was that the transit was at an end before the loss, and that, as the dressing-case was probably lost between the train and the hackney-coach to which the plaintiff's luggage was carried, they were not responsible.

In *Stewart v. The London and North Western Railway Co.*, (10 L. T. Rep. N. S. 302,) this last case is spoken of by *Bramwell*, B., who says, "I was counsel in that case, and certainly thought it a hard one upon the company; but, assuming that case to be law, it is not this case." It was contended that defendants, as to passenger's baggage, had all the responsibilities of common carriers of goods, and *Story's* opinion to that effect is cited—*Story on Bailments*, sec. 499. *Pollock*, C. B., says, "By the case of *Richards v.*

The London and Brighton Railway, I am not convinced to the contrary; and notwithstanding the eminence of Story as an authority, and his learning and ability, I do not think the luggage of passengers by railway is to be treated as goods which are usually and ordinarily sent as 'goods.' "

It must be noted that this latter case was one in which it was proved that the plaintiff took a ticket at a reduced rate by an excursion train, one term of the contract being that his luggage was at his own risk.

In *Shepherd v. Great Northern Railway Company*, (8 Ex. 30,) the plaintiff put a carpet bag beside him under the seat, containing a large quantity of merchandise. The court held that defendants were bound to carry the plaintiff and his luggage, and that he could not recover for the loss of merchandise. For a few things in the bag, shewn to be "luggage," he was allowed to recover. "The defendants," (says *Parke, B.*), "only agreed for the stipulated fare to carry passengers and every thing which constituted personal luggage."

In *Butcher v. The London and South Western Railway Co.*, (16 C. B. 13,) the plaintiff took his carpet bag into the carriage and placed it on the seat by him. Besides wearing apparel it containing £400. On arrival he alighted with it in his hand. A servant of defendants took it from him, and guided him to a cab inside defendants' station, and placed the bag on the foot-board. Plaintiff returned to the train for his wife. When he came back the cab and bag had disappeared. Defendants contended that they had never received the bag to be carried, besides contesting their liability for its loss at the terminus. The court held defendants liable. *Cresswell, J.*, says, "There was *primâ facie* evidence of the delivery of the bag to the company to be carried." The whole contest was as to the loss at the terminus.

In *Cahill v. The London and North Western Railway Co.*, (4 L. T. Rep., N. S. 246,) the defendants were held not responsible for the loss of merchandise delivered to them by a passenger as his personal luggage. *Erle, C. J.*, says, "The contract by a passenger taking a ticket to be carried with



his luggage, is a contract creating a duty in the railway company to carry safely that which he passes to them as personal luggage, but not that which is in reality not personal luggage, not ordinary luggage, but merchandise.

*Willes, J.*, says, "The fair conclusion is—and that appears to have been the view laid down by *Story, J.*; I believe also entertained by Lord *Wensleydale*; it appears to me to be rather a conclusion of fact than of law; that a ticket so taken gives the passenger a right to have himself and his ordinary personal luggage carried for the payment which he makes."

The *Belfast, &c. Railway Co. v. Keys*, (4 L. T. Rep., N. S. 841,) in the House of Lords, turned on the same difficulty. The plaintiff, as Lord *Westbury* says, "intended to carry as personal baggage that which he was bound in ordinary fairness to have stated and paid for as merchandise." The company admitted that under his ticket he and his personal luggage was to be carried by them. Lord *Wensleydale* says, "The original contract certainly was that the plaintiff was not to pay anything for his luggage, but he was bound to pay for merchandise," &c., &c. *Shaw v. The Grand Trunk Railway Co.*, (7 C. P. 493,) turns on the same distinction between luggage and merchandise, and follows the *Great Northern Railway v. Shepherd*, already referred to, and emphatically recognises the liability to take care of passengers' luggage, quoting with approval *Angell on Carriers*, sec. 115:—"An agreement to carry ordinary baggage may well be implied from the ordinary course of business," &c.

The case before us is free from any of the difficulties presented in some of those cited. I entertain no doubt of defendants' liability for the loss of the plaintiff's personal luggage, under the circumstances stated in the case. If defendants ordinarily permit passengers to take articles of luggage into the carriage with them, making no objection, and not requiring them to surrender it into their servants' special charge, it is not easy to see why they should not be responsible.

DRAPER, C. J.—The judgment which I have just read

was prepared by my brother *Hagarty* under the impression that it would express the unanimous opinion of the court. I concur in the conclusion at which he has arrived, but my brother *Morrison*, I believe, dissents, for reasons which he will give, and I desire, therefore, to add a few words.

The law of common carriers, either by railway or otherwise, I take to be the same here as in England, and therefore, if it be determined there in any particular case that a contract is implied, the same contract will arise here, unless some special condition has been introduced by the company for their own protection. In this case there is a reference to the system of checking, which prevails here with regard to luggage carried on railways, but not in England. I have considered whether the existence of this practice should make any difference, and my conclusion is that it must be regarded as introduced by the company for their own benefit, not for that of passengers. If the law be the same in both countries, and makes the company liable for passengers' luggage, as I take it to do, then I do not see how the responsibility can be altered by any difference in the system which they may chose to adopt for the care and management of it. In England the luggage is often carried on the tops of the various cars, and in no way identified with its owner but by marking upon it the destination. Here there is usually a baggage-car, on which the company require all baggage to be placed which is not carried by hand; and in addition to that there is a system of checks, one check being attached to the luggage, and another, with a corresponding number upon it, given to the owner, which must be produced on claiming the property. These, I think, are to be considered only as additional precautions taken by the company, beyond what is customary in England, in order to prevent the luggage from being given up to the wrong person. They would be liable for a loss, in case no such means had been taken, and if, notwithstanding, a loss occurs, I do not think their liability is changed, in the absence of express notice on their part that they will be responsible only for articles checked.

This being so, I think the case cited by my brother

*Hagarty*, from 7 C. B. 839, is conclusive, and it is as strong a case in its circumstances as could well be conceived. There it did not appear that any of the company's servants had the least notice of any such thing as was lost being on the train, and the loss was not observed until the plaintiff had entered a hack, another mode of conveyance, and driven two or three miles from the station. The company were held liable; and though Baron *Bramwell*, in *Stewart v. London and N. W. Railway*, remarked that it was a hard case upon the defendants, I am not aware that the decision has ever been impugned.

MORRISON, J.—I regret that I am unable to concur in the judgments just given. The system of checking luggage, and the appropriation of a particular car for it, the construction of the passenger carriages and the passing to and fro of passengers in them at their pleasure, so entirely differs from the system and customs prevailing in England, that I cannot avoid keeping those differences in view in applying the law and principles laid down in the English cases. Here the passenger frequently takes into the carriage with him portions of his luggage, for his personal use and convenience during the journey, retaining it entirely under his own control, and removing it from time to time from one car or seat to another. As to the system of checking, which is a custom practised upon all our railways, I think it is but a fair construction to put upon it, to consider it as a notice to passengers that all articles of luggage which they do not desire or prefer to keep under their own personal care and at their own risk must be checked or handed to the Company's officers.

In all the cases relied on by the plaintiff, it is important to note that the losses complained of were in some degree caused by the neglect or misconduct, or through the interference of the Company's servants, they having either taken charge of or dealt with the missing articles in one way or another; and although the principles laid down in those cases are apparently broad enough to create the liability without such interference, yet the material parts of those decisions



rest to a great extent upon the conduct of the Company's officers or servants; and from what was said by *Wilde*, C. J., in *Richards v. London & South Coast Railway Company*, (7 C. B. 859,) the question of liability depends upon the particular circumstances, for when referring to the circumstances under which the plaintiff's dressing case was put into the carriage, he says: "No doubt this might have been done under such circumstances as would discharge the carriers, or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend upon the evidence."

Now it appears to me upon the facts and circumstances here admitted, and the conclusion to be deduced from them, that the defendants were discharged from responsibility as to the plaintiff's bag. I cannot arrive at any other conclusion than that the bag was under the personal care and charge of the plaintiff, and virtually withdrawn by him from the care and control of the defendants, a view which is supported by the act of the plaintiff at London, using the bag for the purpose of retaining his place in the carriage, by placing it on the seat when going out for refreshments.

I am therefore of opinion that a nonsuit should be entered.

Judgment for plaintiff, *Morrison*, J., dissenting (a).

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(a) At the conclusion of this judgment *Boulton*, for the plaintiff, mentioned that in practice the Railway Companies decline to check small articles like the bag in question, for fear of injury to them in the baggage-car; and that these defendants had in fact refused to check this bag, when asked to do so by the plaintiff on a previous occasion.

## PICKARD V. WIXON.

*Trespass—Right of way—New assignment—Breach of covenant by lessee—  
Effect of parol permission by lessor.*

Declaration for breaking and entering the plaintiff's close, part of the east half of a lot in the township of Blanshard. *Plea*, that defendant leased the land to plaintiff, by a deed, in which it was covenanted that defendant should have a road along the west side of the premises, extending from the highway at the south to defendant's land at the North: that at the time of the demise there was a fence on the east side of this road, which fence the plaintiff covenanted to keep in repair, but that he did not do so, whereby, and without defendant's default, defendant's cattle strayed from the road on to the plaintiff's land, which are the alleged trespasses. On this the plaintiff took issue.

At the trial the lease was put in, by which the defendant demised twenty-five acres of the east half of the lot to the plaintiff. It contained an agreement that defendant should have a road on the west side of the land demised, and a covenant by plaintiff to repair the fences. When this lease was executed there was a fence running from east to west across the east half, but too far south to leave the defendant twenty-five acres, and it was therefore removed further north by the act of both plaintiff and defendant, when it formed the boundary between them. There was a line fence dividing the east from the west half of the whole lot, and adjoining it on the east was the right of way reserved, with a fence separating it from the rest of the land leased. This fence ran to the original north fence, but was not extended so as to join it when that fence was moved. The north fence in its new position joined the line fence between the east and west halves, but there was contradictory evidence as to whether it did so originally, or extended only to the road reserved, leaving the north end of such road open. The fence separating the road from the land leased was removed by plaintiff, with defendant's express assent, if not by his directions. The defendant for some time, when he required to use the road, took down and replaced the fence at the north end of it, but after harvest he left it down, and continued to do so from time to time when it was put up again by the plaintiff. His cattle thus got on the plaintiff's land, which was the trespass complained of.

*Held*, that the removal of the fence by plaintiff would *primâ facie* excuse a trespass *extra viam*, which the plea admitted, and that if defendant's consent to such removal would prevent him from setting it up as a wrongful act, the consent should have been replied.

*Semble*, however, that unless defendant himself caused the removal, so as to make it his own act and not the plaintiff's, it would be a breach of the covenant; and the evidence here amounted only to a permission.

*Held*, also, that as it was necessary to take down the north fence to use the right of way, this act justified the single act of trespass charged, and the plaintiff should have new assigned if he relied upon excess in the quantity taken down, or in leaving the space open too long.

The plaintiff, therefore, on the pleadings and evidence, was held not entitled to recover.

DECLARATION.—*First count*, for breaking and entering part of the east half of lot No. 22, in the south boundary concession of Blanshard, containing 25 acres, except about two acres in the middle of the lot, on which there is a one-story frame house and an orchard.

*Second count.*—That defendant, by deed, dated 3rd November, 1863, demised to the plaintiff the premises mentioned in the first count, reserving the two acres, &c., for his own use, for a term of two years, and covenanted with the plaintiff for quiet enjoyment by the plaintiff. *Breach*, that the defendant entered and disturbed the plaintiff, and evicted him.

*Pleas*, to the first count—1. Not guilty. 2. Land not the plaintiff's. 3. Leave and license. 4. Admitting a lease, as stated in the second count—that among the covenants therein was one that defendant should have the privilege of a right of way along the west side of the premises, for himself and certain animals, which right of way extended from the highway at the south end of the premises, being a portion of the lot in rear of the land demised: that at the time of the demise there was a fence on the land demised, and along the easterly limit of the said reserved road, to prevent horses, &c., from straying therefrom and entering on the other portion of the premises, and by the lease the plaintiff covenanted to keep the fence in repair, but did not do so, whereby, and without the defendant's default, his horses, &c., strayed from the road and entered upon the premises—*quæ sunt*, &c.

To second count.—1. Breach of covenants to be kept by plaintiff, which made it lawful for defendant to enter and expel the plaintiff. 2. Breach of covenant by plaintiff to keep this fence in repair, wherefore the plaintiff entered. 3. Setting out the lease and reservation of a road, as in the fourth plea to the first count, and plaintiff's covenant to keep the fence separating that road from the residue of the premises in repair; that the plaintiff did not do so, whereby, and without defendant's fault, his horses, &c., strayed, &c. 4. To second count, traversing the breach of covenant for quiet enjoyment. Issue taken on all the pleas.

The case was tried at Stratford, in April, 1865, before *Hagarty, J.*

The lease, dated 3rd November, 1863, was put in, made between defendant and plaintiff, demising to plaintiff for two years from the date part of the east half of No. 22,



in the south boundary concession of the township of Blandshard, containing twenty-five acres, (the whole lot containing 100 acres,) except about two acres, situate in the middle of the lot; on which there was a one-story frame house and an orchard, which defendant reserved. Rent two dollars per acre, payable yearly. The plaintiff covenanted to pay rent and taxes, to cultivate in a husband-like manner, &c., to repair buildings, fences, &c. It was also agreed that defendant "is to have the privilege of a road on the west side of the lot" leased. On breach of any covenant by plaintiff, the defendant might enter and expel the plaintiff, and the defendant, subject to the plaintiff's paying rent and keeping his covenants, covenanted for the plaintiff's quiet enjoyment.

It was proved, on the plaintiff's part, that at the time of the execution of this lease there was a fence running from east to west across the lot, dividing it into two parts. As that fence stood the part enclosed would not contain twenty-five acres, including the two acres reserved, and it was therefore removed, by the mutual act and consent of both parties, further north, and when so moved it formed the boundary between plaintiff and defendant.

There was a line fence, which divided the part of the east half demised to the plaintiff from the west half, and adjoining the line fence was the right of way reserved by the lease, with a fence which separated it from the rest of the land demised. This latter fence extended from the southern boundary of the land to the north fence as it stood at first, but it never was extended to the place where the present north fence stands. There was contradictory evidence as to whether the original north fence ever extended to the line fence, but the weight of evidence was that it did not. The present north fence was however put up so as to join the line fence, and it divided the land demised to the plaintiff from the north part of the east half lot, which the defendant retained in his own possession, and on which he had a slashing, next to the fence.

The fence which had separated the reserved road from the rest of the land leased was removed by the plaintiff, and,

as was sworn, with defendant's knowledge and express assent, if not direction, and the rails thereof were partly used for the new north fence, and to repair the line fence.

For some time after the north fence was thus put up, the defendant, when he required to use the right of way, laid down a small part of the north fence very near to the line fence and put it up again immediately ; but after harvest in 1864, he left it down altogether, and though remonstrated with by the plaintiff, who had put it up, he said that as often as the plaintiff put it up he would throw it down, and he continued to do so from time to time. His cattle, pigs, &c., came through the opening thus made on the plaintiff's land, pasturing, and doing some damage, of which evidence was given ; and this was the case upon the first count.

There was some further evidence of acts done by defendant, which were proved to support the breach of the covenant for quiet enjoyment.

For the defendant it was objected that the evidence given afforded an answer to the alleged trespass, since the defendant's cattle got on to the plaintiff's land through the defect of fences which the plaintiff had covenanted to keep in repair, and that there was no proof of the breach of covenant for quiet enjoyment, and that mere isolated acts of trespass would not sustain the second count.

Leave was reserved to move for a non-suit on these objections. Evidence for the defence was given to shew the state of the fence on the reserved road when the lease was made, and also to prove that the plaintiff had not kept his covenants, as well as to meet the alleged breach of the covenant for quiet enjoyment.

Subject to the defendant's objection that no consent on the part of the defendant to the removal of the lane fence could affect the lease or the covenant to amend the fences, the learned judge left it to the jury to say if the fourth plea was proved, leaving also the other issues to them. It was, after some discussion, agreed that if a verdict was rendered for the plaintiff it should be entered only on the first count.

The defendant's counsel objected that the jury ought to have been told that if the defendant's horses and cattle

entered upon the reserved road as of right, then upon these pleadings their straying over upon the plaintiff's land would make no difference, as there was no replication of excess or new assignment. The jury found for the plaintiff, on the first count, with one shilling damages.

*M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why a non-suit, or a verdict for the defendant, should not be entered on the leave reserved, on the ground that the plaintiff's case established the defendant's fourth plea, the right of way pleaded and the covenant of the plaintiff to repair fences having been proved by the plaintiff producing the lease under which such right of way was created. He cited *Bracegirdle v. Peacock*, 8 Q. B. 174; *Polkinhorn v. Wright*, *Ib.* 197; *Glover v. Dixon*, 9 Ex. 158; *Ellison v. Isles*, 11 A. & E. 665; *Kelly v. Moulds*, 22 U. C. R. 467.

*C. Robinson*, Q. C., shewed cause, citing *Miller v. Anderson*, 5 C. P. 458; *Phillips v. Treeby*, 8 Jur. N. S. 711, 999; *Bullen & Leake Prec.* 570, 684; *Consol. Stats. U. C.*, ch. 57, secs. 2, 3; *Rawlinson v. Clarke*, 14 M. & W. 187, note to the American Reprint, p. 192; *West v. Blakeway*, 2 M. & G. 729, 742; *Whittier v. Hands*, 18 U. C. R. 295; *Add. Con.* 916.

DRAPER, C. J., delivered the judgment of the court.

The fourth plea confesses a trespass, and in avoidance sets up that there was a road reserved by defendant over the *locus in quo* in his lease to the plaintiff of the land on which the trespass is charged to have been committed. Had the plea stopped there, and had the plaintiff only taken issue upon it, the defendant must have succeeded, for the reservation of the road, though somewhat confusedly pleaded, is sufficiently made out in evidence. But the plea goes further, for it impliedly confesses a trespass *extra viam*, and sets up as an answer to it that there was a fence which bounded the east side of the road: that the plaintiff covenanted to keep it (with the other fences) in repair: that he did not do so, and hence the defendant's cattle strayed from the road on to the plaintiff's land, which are the trespasses,



&c. By this plea the defendant anticipates and as it were prevents or excludes a replication of *extra viam*, and excuses a trespass *extra viam*, while by taking issue the plaintiff admits he is suing for the trespass thus sought to be excused.

It then becomes a question of fact. A fence, the boundary of the east side of the road, is proved to have been standing when the lease was made. The plaintiff has removed it away since he entered. This act would *primâ facie* excuse a trespass by defendant's cattle *extra viam*. The plaintiff, however, insists that he removed the fence by the defendant's consent and authority, and that therefore the defendant cannot set up the removal as a wrongful act of the plaintiff and a bar to his recovering. Conceding, for the argument's sake, this to be so, it appears to me beyond doubt that the question should have been raised by replication or new assignment, to which the defendant might have rejoined. I incline strongly to the conclusion, that unless the lessor himself caused the alteration which is set up in the plea as a breach of the lessee's covenant, so as to make the removal of this fence his own act, and not the act of the lessee, the latter would be guilty of the breach of covenant. The evidence at most only amounts to a parol permission. It does not go so far as a command, nor does it show that the act was for the benefit of the lessor, or at his instance, so as to bring it within the case of *Rawlinson v. Clarke*, cited by Mr. *Robinson*.

Or the plaintiff relies on the defendant's conduct in throwing down the northern fence, and keeping the space thus created open, thereby exposing the plaintiff's land to trespass from the adjoining land of the defendant. If so, we must remember that the declaration charges a single act of trespass, and that the defendant shews a right of way over the plaintiff's land. To use this right of way it was necessary and unavoidable for the defendant to take down the fence, and this act being lawful, and a justification of the assumed act of trespass in throwing open the fence, the plaintiff should have new assigned if he meant to rely on excess in the quantity thrown down, or in keeping the space open for an unreasonable time.

In any point of view, the plea and proof in support of it appears to me to have rendered a replication necessary to enable the plaintiff to displace the defence, and that for want of such replication the plaintiff's case fails.

I think, therefore, that the rule should be made absolute to enter a nonsuit.

My brother *Hagarty*, not having been able to consider this case with us, takes no part in the judgment.

*Morrison, J.*, concurred.

Rule absolute.

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### BALL V. SPRUNG.

*Appeal from county court—Verdict entered on motion, without leave reserved—Practice.*

A rule *nisi* to enter a verdict for the plaintiff, or for a new trial, was made absolute in the county court in the first alternative, although defendant had not assented to any leave being reserved to move. On appeal this court directed the rule absolute to be discharged, leaving it to the court below to dispose of the application for new trial, the other alternative of the rule *nisi*.

APPEAL from the County Court of Huron and Bruce.

This was an action for converting goods, and on the common counts.

At the trial in the court below the jury found a verdict for defendant, but they were requested to assess the damages sustained by the plaintiff in case he should be entitled to succeed, and they settled this amount at \$30.

Leave was reserved to the plaintiff to move to enter a verdict in his favor for this sum, the defendant not assenting to the reservation, although the learned judge was at the time under the impression that it was not objected to; and a rule *nisi* obtained in pursuance of such leave, or for a new trial, was made absolute to enter the verdict accordingly.

The defendant thereupon appealed.

*O'Connor*, for the appellant.

*S. Richards*, Q. C., contra.

DRAPER, C. J., delivered the judgment of the court.

The amending act, 27 Vic., ch. 14, sec. 2, seems to extend to the question brought before us, as the rule on which the judge has given his decision was upon leave reserved to move to enter a verdict for the plaintiff. Otherwise there would apparently be no appeal, under Consol. Stats. U. C., ch. 15, sec. 67.

There could be no doubt that the learned judge had no authority to reserve any such leave to the plaintiff without consent of the defendant, which consent it now appears was not given. The rule absolute to enter a verdict for the plaintiff, in lieu of that given for the defendant by the jury, cannot be upheld, and we must order and direct that such rule absolute be discharged, without costs, however, under the circumstances.

The rule *nisi*, however, contained two alternatives; one to enter a verdict for the plaintiff, the other for a new trial. This latter alternative has not been decided upon, nor indeed could it, for the former part being granted rendered it impossible to grant the latter. As in our judgment the decision given must be annulled, the question presented by the latter alternative necessarily arises, or the verdict for the defendant must stand. No decision has been given upon this in the court below, and the reversal of the decision given has not proceeded upon the merits, which we declined to hear, as there was a clear want of authority. We cannot therefore decide on appeal when the court below has not decided anything as to the question of new trial, and we must leave the case to the jurisdiction of the County Court judge, subject to the decision above given, in order that the latter alternative of the rule may be disposed of by him.

Appeal allowed.

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## MCDONALD V. McDONELL ET AL.

*Sale for taxes—13 & 14 Vic., ch. 67—Sale under—Power of sheriff to convey after repeal of by 16 Vic., ch. 182—Casus omissus.*

The 13 & 14 Vic., ch. 67, allows three years for redemption of land sold for taxes, before the sheriff can convey. It was repealed by 16 Vic., ch. 182, which came into force on the 1st of January, 1854, except in so far as it might affect "any rates or taxes of the present year," 1853, "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this act." The plaintiff purchased, under 13 & 14 Vic., in 1852, so that he was not entitled to a conveyance until the act had been repealed.

*Held*, that as the exemption in the repealing clause gave no power to complete inchoate proceedings, the sheriff could not convey, although such a result was clearly not intended

This case was tried at the last spring assizes, at Cornwall, before *Morrison*, J. The facts (with one exception) are reported ante, page 74. The exception is, that since the judgment there reported the sheriff had executed a new deed to the purchaser for taxes, in which the land was properly described.

The sheriff's vendee was plaintiff, and obtained a verdict, with leave reserved to the defendants to move to enter a verdict for them.

*M. C. Cameron*, Q.C., obtained a rule *nisi* accordingly, citing *Bryant v. Hill*, 23 U. C. R. 96.

*J. S. McDonald*, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

The treasurer's warrant for the sale was issued and delivered to the sheriff on the 24th of April, 1852.

The assessment law then in force, under which this sale was made, in the same year, 1852, was the 13 & 14 Vic., ch. 67.

By the 56th section of that act the owner of the estate sold might redeem the same within three years from the date of the sale, but (sec. 67) if the land were not redeemed within the period allowed for redemption, the sheriff was directed at any time after that period to execute and deliver a deed of sale conveying the land to the purchaser in fee.

The 16 Vic., ch. 182, which took effect upon the 1st of January, 1854, repealed 13 & 14 Vic., ch. 67, with the following reservation in the repealing clause, "except in so far as the same may affect any rates or taxes of the present year," (1853), "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this act."

The sheriff's deed which was under our consideration on the former occasion between these same parties bore date the 6th of October, 1855. The deed now relied upon was executed within the present year. The sheriff's authority to sell, as well as to convey, is derived exclusively from the statutes authorizing sales of lands the rates upon which are in arrear more than a limited time. Such power has been conferred by various statutes, successively repealed, till we come to the present law. The 6 Geo. IV., ch. 7, first gave the power to sell lands for arrears of taxes, and it continued in force (with some amendments) until repealed by 13 & 14 Vic., ch. 66.

The provisions of that statute as to the exception from repeal of the 6 Geo. IV., are precisely similar to those set forth above, as contained in the 16 Vic., ch. 182. The effect of those exceptions has been already the subject of decision in this court, in the late case of *Bryant v. Hill*, cited in the argument. Neither in the 13 & 14 Vic., nor in the 16 Vic., nor in the Consol. Stat. U. C., ch. 55, is there any power given to complete sales made under a preceding statute, by executing a conveyance at the expiration of the period limited for redemption; the power to convey appears limited in each statute to lands sold under the provisions and authority thereof.

But for such statutes the sheriff would have had no authority to sell or to convey. Every act done by him by which the owner of land rated and taxed is deprived of his estate, is under a power conferred by the statutes. A repeal of each such statute is a revocation and cancellation of all powers conferred by it, saving the exceptions to the repeal. But the power of the sheriff to complete a sale by

conveying is not among the exceptions, nor is there any enactment that pending proceedings may be completed notwithstanding the repeal. It might be a question, even if this sale had taken place under the 16 Vic., which remained in force until consolidated by ch. 55 of the Consol. Stats. U. C., whether subsec. 7, of sec. 7, of ch. 1, of those statutes, would enable the sheriff to make the conveyance. But assuming that effect and consequence, the 7th section of ch. 1, is very differently worded from the exceptions contained in the repealing clause of 16 Victoria.

The plaintiff's case is a hard one. He purchased and paid his money in conformity with the law. He could not get a conveyance until the expiration of three years from the day of sale, and before the expiration of the three years the statute was repealed without any provision for completing inchoate proceedings. It is impossible to suppose that the Legislature intended this result, or would not have prevented it had their attention been drawn to it.

As the matter stands, the act which authorizes this particular sale and a conveyance to complete it was repealed before the time for conveying had arrived. The repealing act (16 Vic.) also authorizes sales for taxes in arrear, and gives power to the sheriff to convey if the lands are not redeemed within "the period *hereinbefore* allowed" for redeeming, *i.e.*, within one year from the day of sale. I cannot construe this to be a power to convey lands sold under the repealed act, any more than I can hold that the power given to the sheriff to convey continued to exist when the statute which created it was repealed.

It is to be observed also, that the repealing clause speaks of cases where the taxes "are actually due," which can hardly apply here, for the plaintiff had paid them on his purchase of the land, so that nothing was due. The saving seems to have been intended only for the benefit of the municipalities, to enable them to collect unpaid taxes.

I think therefore the rule to enter a verdict for the defendants must be made absolute.

MORRISON, J.—I concur in the learned Chief Justice's



judgment. I regret to say that, putting a proper construction on the statutes, I do not see how it is possible to arrive at any other decision.

To hold otherwise would be in effect to add an enactment to the repealing Act 16 Vic., ch. 182. I have no doubt that if this case had been present to the minds of the legislature the necessary clause would have been added to save the rights of parties.

It is a great hardship on the plaintiff, and there may be many similar cases.

In my judgment the remedy must be sought for from the legislature.

Rule absolute to enter nonsuit.

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### HERBERT QUI TAM V. DOWSWELL.

*Magistrates—Oath of qualification—Consol. Stat. C. ch. 100.*

Under Consol. Stat. C. ch. 100, section 3, the oath of qualification by a Justice of the Peace must be taken before some J. P. of the County for which he intends to act. It cannot be administered by the Clerk of the Peace for such County, under the writ of *Dedimus Potestatem* issued with the Commission of the Peace.

This was an action of debt brought to recover from defendant, a Justice of the Peace for the United Counties of Lanark and Renfrew, a penalty of \$100, under Consol. Stat. C. ch. 100, and a penalty of \$80 under ch. 124, Consol. Stat. U. C.

The declaration contained three counts. 1st, for acting as a J. P. without taking the oath required by the third section of the act first mentioned before a J. P. of the United Counties of Lanark and Renfrew. 2nd, for acting as a J. P. without having the necessary property of qualification required by that statute. 3rd count, defendant having convicted plaintiff upon a certain charge, for wilfully receiving from plaintiff a larger amount of fees than by law authorized in respect of such conviction, contrary to the provisions of Consol. Stat. U. C. ch. 124.

*Pleas*—Not guilty, by statute, to all the counts.

At the trial before *Morrison, J.*, at the last Perth assizes, it appeared from the testimony of Mr. Berford, the Clerk of

the Peace for the United Counties of Lanark and Renfrew, that the defendant's name was in the commission of the peace for those counties : that after the issuing of the commission, on the 17th of June, 1859, he made oath to his property qualification before him, the Clerk of the Peace, who stated that he administered the oath to defendant under the authority of the writ of *Dedimus Potestatem* (which the Crown issues with and which accompanies the Commission of the Peace) directed to those named therein, to take the oath of office of the justices named in the commission, and it also appeared that the defendant took no other oath of qualification except the one referred to.

Evidence was also given to shew that the defendant acted as a Justice of the Peace, under the first count. The evidence given to establish the second and third counts was not sufficient.

The defendant's counsel moved for a nonsuit, contending that the oath of qualification sworn before the Clerk of the Peace was a good and valid oath, notwithstanding the provisions of sec. 3, of Consol. Stat. C. ch. 100 ; and it was agreed that a nonsuit should be entered, with leave reserved to the plaintiff to move to enter a verdict for him on the first count for the penalty of \$100, if the court should be of opinion that the defendant should have taken the oath of qualification before a Justice of the Peace.

*Robert A. Harrison* obtained a rule *nisi* to set aside the nonsuit and to enter a verdict for the plaintiff on the first count for \$100, in pursuance of the leave reserved, on the ground that the oath of qualification of defendant should have been taken before a Justice of the Peace.

*Deacon* shewed cause.

MORRISON. J. delivered the judgment of the court.

By the third section of ch. 100, of the Consol. Stat. C. it is enacted, that when not otherwise provided for by law, no person shall be a Justice of the Peace, or act as such within any District or County of this Province, who has not in his actual possession, to and for his own

proper use and benefit, a real estate, &c. (as mentioned in the section); "or who before he takes upon himself to act as a Justice of the Peace, does not take and subscribe the oath following, before some Justice of the Peace for the District or County for which he intends to act, that is to say :—I. A. B. do swear," &c., (as set out in the section).

The fourth section requires that a certificate of such oath having been so taken and subscribed as aforesaid, shall be forthwith deposited by the Justice of the Peace who has taken the same at the office of the Clerk of the Peace for the said County, and shall by the said clerk be filed among the records of the sessions. And the sixth section enacts, that when not otherwise provided, any person who acts as Justice of the Peace in and for any District or County in this Province, without having taken and subscribed the aforesaid oath, or without being qualified according to the true intent and meaning of the act, shall for every such offence forfeit the sum of \$100, &c., to be recovered, &c.

We are of opinion that the rule ought to be absolute to enter a verdict for the plaintiff on the first count of the declaration. We are bound by the plain language of the statute, which expressly requires the oath of qualification to be taken before some Justice of the Peace for the County for which the defendant intended to act, which in the present case would have been before one of the Justices of the Peace for the United Counties of Lanark and Renfrew. Instead of which the defendant took the oath before the Clerk of the Peace for the United Counties, who, supposing he had authority to do so, administered it under a writ of *Dedimus Potestatem*.

The rule must be absolute to set aside the nonsuit and enter a verdict on the first count for the plaintiff and \$100 damages, and for defendant on the second and third counts.

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## VIDAL V. THE BANK OF UPPER CANADA.

*Interpleader—Verdict taken in the absence of defendants' counsel—New trial—Affidavit of merits.*

*In an interpleader issue*, the verdict having been taken in the absence of the defendants' counsel and attorney, the court granted a new trial without requiring the usual affidavit disclosing fully the merits, holding that there was not the same necessity for such affidavit in an interpleader as in other cases.

The attorney, who was also counsel in the case, not having satisfactorily excused his absence, the relief was granted only on payment of costs by him within a month.

This was an interpleader issue directed to try the plaintiff's right to certain goods taken in execution at the suit of the defendants, on a writ issued on a judgment recovered by them against Theodore Baron Jasmund. It was tried at Sandwich on the first day of the last Spring Assizes, being the 17th of April last. No one appeared for the defence, and the plaintiff having given evidence of his title recovered a verdict.

G. D'Arcy Boulton for the defendants, applied for a new trial on an affidavit of their attorney, who lived at Sarnia. It was therein sworn that on the first day of the Assizes at Sandwich, he took the first conveyance from Sarnia, the river steamboat, and arrived at Sandwich about five p.m., but would have arrived three hours earlier, and before the case was called on, had not the boat been detained "by stress of weather and high winds on Lake Huron."

The defendants' attorney was also their counsel in the cause, and concluded his affidavit thus: "I am thoroughly acquainted with all the transactions out of which this action arose, and in my opinion the defendants have a sure and certain defence legally and equitably, and will secure a verdict in their favour if a new trial be granted."

The venue in this case was at first laid in the County of Lambton, and was changed by judge's order to the County of Essex. After this the defendants obtained a summons to put off the trial, which was enlarged to be heard before the judge at *nisi prius*. The case was tried before the arrival of the defendants' attorney, and it was not shewn that the

learned judge was informed that such a summons was pending. Notice was served on the plaintiff's attorneys that the defendants would not be ready to try, and would apply to put the case off.

It appeared from an affidavit filed in reply that the plaintiff's counsel could not remain beyond the first day of the Assizes at Sandwich, and that one of the plaintiff's witnesses stated he could not remain beyond the first day, and that his evidence was indispensable. It was further shewn that a railway train left Port Huron, opposite to Sarnia, in the morning, and arrived at Detroit, opposite Sandwich, about eleven in the forenoon, while the steamer rarely arrived by two p.m.

*M. C. Cameron*, Q.C., and *Kerr*, for the plaintiff, strongly objected to the want of a proper affidavit of merits, citing *Bower v. Kemp*, 1 Dowl. 282; *Lane v. Isaacs*, 3 Dowl. 652; *Page v. South*, 7 Dowl. 412; *Moore v. Hicks*, 6 U. C. R. 27; *Blackhurst v. Bulmer*, 5 B. & Al. 907; *Gwilt v. Crawley*, 8 Bing. 144; *Breach v. Casterton*, 7 Bing. 224; *Doyle v. Fraser*, 5 O. S. 59; *Pardow v. Beatty*, 6 U. C. R. 496; *Gunn v. Van Allen*, 5 U. C. R. 513; *Doe Stewart v. Yager*, *Ib.* 584; *Kenney v. Hutchinson*, 4 Jur. 106.

*Boulton*, contra, cited *Regina v. Baker*, 6 C. P. 68; *Townley v. Jones*, 8 C. B. N. S. 289; *Cook v. Beardsall*, 1 L. T. Rep. N. S. 14; *Flooks v. Marriott*, 7 L. Rep. N. S. 363; *Neave v. Milns*, 24 L. T. Rep. 215.

DRAPER, C. J., delivered the judgment of the court.

If the case rested upon the sufficiency of the affidavits filed by defendants as to the merits, the rule must be discharged. The practice, as established by our court, in this respect, on applications for new trials and other cases of an analogous character, is in my judgment a sound one, and I am not disposed to depart from it in ordinary cases.

There is however a difference with regard to an interpleader, for there the matter has been under the consideration of a judge, who has seen fit to direct an issue to be tried. We may assume that a substantial question is raised by both

sides, and one which ought to be passed upon by a jury. If, as in this case, a verdict is obtained without the merits having been gone into, (neither party abandoning their respective claims,) one of the objects of the ordering the interpleader is defeated, and I do not think we should hold that there is the same necessity for an affidavit disclosing the merits as in other cases (*a*).

Then as to the other point. The defendants' attorney does not state at what hour the steamboat left Sarnia on the morning in question, and from the peculiar expression accounting for her detention it might be supposed she was delayed on Lake Huron, and not in coming down the river from Sarnia. He thinks it enough to say he took the *first* conveyance, though it seems that by railway he could have come in half the time. I do not think that he satisfactorily excuses his not being present at the opening of the court, especially as he had a summons pending to put off the trial. The only terms on which we can relieve the defendants, is on payment of costs, and I think the attorney should pay them, and that the payment should be made within one month, otherwise the plaintiff will be at liberty to enter judgment.

My brother *Hagarty* takes no part in this judgment.

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(*a*) See *Vidal v. Bank of Upper Canada*, 15 C. P. 421, in which the same view is taken.



## DOUGALL V. WILSON.

*New trial granted—Costs to be paid by the Attorney.*

In this case also, not an interpleader, a verdict was taken for the plaintiff in the absence of defendant's attorney, and a new trial was granted on payment of costs by the attorney within a month.

This case differed in some respects from the foregoing one, for it appeared there was an understanding between the attorneys for the plaintiff and defendant that the trial should not take place until the third morning of the assizes, and the whole civil docket was disposed of on the second day. This cause was in fact taken on the first day, having been called on, and the plaintiff's counsel appearing, and the defendant being unrepresented. The understanding as to the trial did not appear to have been communicated to the learned judge, nor was he asked to sanction it. The defendant's affidavits shewed a claim to a large set-off, and reason for believing that the plaintiff was insolvent, and that the defendant would lose his claim unless he could thus avail himself of it. On the other hand, it was sworn that the plaintiff had assigned his interest in the mortgage sued on to a third party, who was beneficially interested in the action as entitled to the mortgage money, and that it was prosecuted for him, and that he had no knowledge of or connection with the claim sought to be set off. No such matters appeared on the record.

*Becher*, Q.C., obtained a rule *nisi* for a new trial, to which *Robert A. Harrison* shewed cause.

DRAPER, C. J., delivered the judgment of the court.

On the whole we think we should relieve the defendant on the same terms as in the foregoing case—payment of costs by the defendant's attorney in one month, otherwise the plaintiff to be at liberty to enter judgment.

*Per Cur.*—Rule accordingly.

## STEWART V. LÓWE.

*Advances on goods received for sale.—Right of action for.*

Defendant, living at Chatham, consigned to the plaintiff at Montreal certain tobacco for sale, and, without previous authority, drew upon him at the same time for \$250, which the plaintiff accepted and paid. The price which defendant asked could not be obtained in Montreal, and the plaintiff therefore shipped the tobacco to England, where it was sold. The net proceeds, after deducting freight and charges, were only £14, sterling, and he sued defendant upon the common counts for the difference, \$278, the expenses of shipping being also deducted. Defendant pleaded never indebted, payment, and set-off. When the draft fell due defendant had written to the plaintiff, offering to raise funds to retire it by drawing upon him again. The account sales received by the plaintiff from England had been sent to the defendant, who said on receiving them that he did not think he ought to bear the whole loss, but offered \$150. The jury gave a verdict for \$200.

*Held*, there being no evidence of any special contract, that the plaintiff was entitled to receive his advances without waiting for the sale of the tobacco, and that if the plaintiff had done wrong in his dealings with it, such defence should have been pleaded. The verdict was therefore upheld.

Action on common counts, for money, goods, work and labour as agent for defendant, and for commission for acceptance of defendant's drafts, interest, and on account stated.

*Pleas*.—1. Never indebted. 2. Payment. 3. Set-off for goods sold and delivered, and for goods bargained and sold, and for interest on money due by plaintiff to defendant. Issue.

The case was tried at Sandwich, in April, 1865, before *John Wilson, J.*

It appeared that the plaintiff carried on business as merchant and commission agent at Montreal, and the defendant carried on business at Chatham. In January, 1864, the defendant sent to the plaintiff six hogsheads of tobacco, which in a letter of advice to the plaintiff he described as very superior, and supposed the plaintiff would be able to get ten cents per pound for it. In this letter he further stated that he had drawn on the plaintiff for \$250, at thirty days. In another letter, dated the 17th of February, 1864, he alluded to this draft as having fallen due, and said: "If you wish I can draw on you again for the amount of draft, and send you the funds. I suppose

you have not as yet sold any of it." The plaintiff accepted the draft and paid it at maturity, and proved it on the trial.

The price at which the defendant desired the tobacco should be sold could not be realized in Montreal, and as the market continued to fall, the plaintiff, in June, 1864, shipped the tobacco to England. The plaintiff had another consignment of tobacco from one Campbell, which was sent to England along with the defendant's. In August following the defendant told a witness who was called for the plaintiff, that Campbell had told defendant that the plaintiff had consigned the tobacco to England, and that he (defendant) was perfectly satisfied that the plaintiff had done so. As soon as the plaintiff got the returns, or account of sales, from England, he sent them to the defendant, which account defendant afterwards returned to the plaintiff, as it was rendered to him, by which it appeared that the net proceeds of the tobacco, after deducting freight and charges, was £14 14s. 1d., sterling. After receiving this account, defendant said to the same witness, that he did not think he ought to pay the full amount of the loss, and offered to pay \$150 in full. Besides the charges mentioned in the account of sales, the expenses of shipping the tobacco were about \$46, upon which, and including interest, the plaintiff claimed a balance of \$22 58, together with a commission of two and a half per cent. on accepting defendant's draft, making the plaintiff's whole demand \$278 83.

On the defence was proved a letter from the plaintiff to the defendant, dated 21st of January, 1864, acknowledging the receipt of the six hogsheads on defendant's account, and regretting that the market continued dull, so that he had no sales to advise. Also an account sale, dated the 6th of February, 1865, rendered by plaintiff to D. Campbell, of six hogsheads of Canada leaf tobacco, shipped to England and sold there on the joint account of Campbell and the plaintiff, in which the plaintiff claimed a balance due him. The plaintiff's witness stated on cross-examination that eleven hogsheads were shipped to London, and one to Glasgow. The eleven were sold together. All twelve were



sold at the same price, and the agent in England kept no separate account of the defendant's and Campbell's tobacco. This witness stated, that defendant's tobacco was never opened in Montreal, but was shipped to England as it was received.

The defendant said that the plaintiff had shipped the tobacco to England without instructions from him, and he (defendant) ought not to pay more than \$250. The defendant also put in evidence another letter written by the plaintiff to him, in which, among other things, the plaintiff attributed the small sum realized to the great inferiority of defendant's tobacco, and its being in bad order, and offered to accept \$250 in settlement, and observed that he charged nothing for his trouble, which had been by no means inconsiderable, and also charged no commission. The defendant further proved that his tobacco was a good sample, and in good order when sent to Montreal, better than Campbell's.

The defendant's counsel applied for a nonsuit, on the ground that the plaintiff's evidence did not shew that he had performed his duty as agent for the defendant in regard to the tobacco: that he had not properly accounted for it, which was a condition precedent to his right to recover; and that there was no legal evidence of the sale of the tobacco in England, nor of the defendant recognising or adopting the plaintiff's act in shipping the tobacco to England, nor of the returns of the sales.

Leave was reserved to move for a nonsuit, and the case was left to the jury, who gave the plaintiff a verdict for \$200.

*Becher*, Q. C., obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered pursuant to the leave reserved, or for a new trial on the same grounds as those on which a nonsuit was asked for; and further, that the plaintiff by his mode of dealing with the tobacco made it his own, and should have allowed the defendant the Montreal value for it; and that the plaintiff's evidence was insufficient to sustain his case.

*Scott*, shewed cause, and cited *Gaskill v. Skene*, 14 Q. B. 664; *Sherman v. Sherman*, 2 Vern. 276; *Palmer v. Holmes*,

14 C. P. 195. [*Hagarty, J.* referred to *Smart v. Sanders*, 3 C. B. 380.]

DRAPER, C. J., delivered the judgment of the court.

I do not see the evidence of any special contract between these parties, who appear to have stood in the relation of principal and factor to each other. As principal the defendant consigned to the plaintiff as factor six hogsheads of tobacco to be sold. Although not so expressed, it is plain enough that the defendant expected the sale would take place in Montreal, and though the plaintiff was not directed not to sell for less than a named price, the defendant obviously hoped to get ten cents per lb for it.

As soon as he had consigned the tobacco to the plaintiff the defendant drew upon him, without previous authority, for \$250, which draft the plaintiff accepted and paid, and as a fact he has not yet received the amount back. He brings this action to recover it.

In order to succeed upon the plea of never indebted, the defendant must establish that the arrangement between him and the plaintiff was that the latter was to look to the tobacco as a primary fund for payment, which he must exhaust before he can call upon the defendant—in other words, that the defendant would not become indebted for any part of the advance until the tobacco had been sold, and then, if the net proceeds were insufficient to pay the plaintiff, the defendant would become indebted for the amount of the deficiency. In this view the plaintiff would be driven to prove that the tobacco did not realize the amount advanced, in order to shew that the defendant owed him anything, and to prove how much it did actually net, in order to shew how much the defendant was indebted to him.

The case in some respects is very like *Craig et al. v. Corcoran*, (23 U. C. R. 441;) but there the case was a demand for work and labour as brokers and for commission, as well as on the money counts, and upon the evidence it appeared that the wheat was delivered to the plaintiffs by the defendant to be shipped and sold in Liverpool: that they were to make advances at New York and recoup themselves out of

the proceeds at Liverpool. The plaintiffs made it part of their case to prove what the wheat sold for, and what the charges upon and attending the sale were, in order to establish the amount of their claim, which was not limited to the sum advanced by them.

In the present case the plaintiff demands only his advance and interest. No contract is shewn postponing his claim until the tobacco is sold and the amount of the net proceeds ascertained. If the defendant became debtor as soon as the plaintiff paid the draft, then the defence must rest upon the pleas of payment and set-off.

I entertain no doubt that the plaintiff had a right to reclaim his advances without waiting for the sale of the tobacco; and the defendant's letter of the 17th February, 1864, is proof that the defendant so understood it, when he proposed to raise the money to take up the first draft by drawing a second on the plaintiff.

Then the burden of proof is on the defendant to establish the two latter pleas, but the evidence as far as it went shewed the reverse, and entitled the plaintiff at least to the verdict rendered in his favour. Whether the plaintiff did any wrong in dealing with the tobacco as he appears to have done is not now in question, for there is no plea that raises such a defence.

I think the rule must be discharged.

I refer also to a case reported in the last number of the *Jurist*, which tends to support the view I have expressed—*Esteban de Comas v. Prost et al.*, 11 *Jur. N. S.* 417.

My brother *Hagarty* takes no part in this judgment.

*Morrison, J.* concurred.

Rule discharged.

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# IN THE MATTER OF COE AND THE CORPORATION OF THE TOWNSHIP OF PICKERING.

*Temperance Act, 27-28 Vic., ch. 18—Application to quash by-law—Insufficient notice.*

Under the 27-28 Vic., ch. 18, a requisition for the by-law must be published by the clerk for four consecutive weeks in some newspaper published weekly or oftener within the municipality, with a notice that on some day within the week next after such four weeks, a poll would be taken. The notice in this case, first published on Thursday, 12th January, appointed Tuesday, 7th February, for the poll. *Held*, too soon, and the by-law was quashed.

It was contended that the four weeks must be computed from the first day of the week in which the first publication takes place, not from the day of such publication, but *Held*, clearly not.

*Quere*, whether on motion to quash such by-laws, it could have been intended that the court, in term, should enter into a scrutiny of votes.

*Robert A. Harrison* obtained a rule calling on the corporation of the township of Pickering to shew cause why a by-law, in the words and figures following, should not be quashed:—

“Prohibitory by-law.—The sale of intoxicating liquors, and the issuing of licenses therefor, is by the present by-law prohibited within the municipality of the township of Pickering, under authority and for enforcement of the Temperance Act, 1864.”

The affidavit of the relator verified a copy of a requisition, delivered to the clerk of the said corporation, on behalf of the persons whose names were thereunto affixed, as duly qualified municipal electors of that township. The relator swore that the clerk caused that requisition to be printed and published in a newspaper, published weekly at Whitby, four consecutive times—*i. e.*, on the 12th, 19th and 26th days of January, and on the 2nd day of February, 1865; the first publication being on the 12th of January, and the last on the 2nd of February: that annexed to the printed requisition was published a notice, signed by the clerk, that on Tuesday, the 7th of February, 1865, at, &c., a meeting of the municipal electors of the said municipality would be held, for the taking a poll, to decide whether the by-law referred to in the requisition should be adopted or not; and on the said 7th of February a meeting took place, pursuant to such notice, the Reeve

presiding, and the clerk attending with the assessment rolls : that a poll was duly opened, and continued on the 8th, 9th and 10th days of February, when it was closed : that at such poll there were "Yeas" 457, and "Nays" 456. The relator's affidavit then set forth the names of certain of those who voted yea, and stated objections to their right to vote, and concluded by stating that he was advised and believed that a majority of the duly qualified electors of the township, who voted at the said meeting on the said by-law, voted nay.

The objections taken were, that the poll was taken too soon, there having been no sufficient publication, according to statute, and that persons were allowed to vote who were not duly qualified electors of the municipality, whereby there was an apparent majority in favour of the by-law.

*McKenzie*, Q. C., shewed cause.

DRAPER, C. J.—On shewing cause, Mr. McKenzie took a preliminary objection, that the rule should not have called on the Corporation of the township of Pickering, but on the inhabitants of the township, or the duly qualified electors thereof.

We expressed our opinion that a by-law, whether passed under section 1 of the Statute, 27-28 Vic., ch. 18, and approved by the electors, or adopted by the electors, according to the provisions of the same statute, without having been previously passed by the municipal council, is equally a by-law of the corporation, and being so, that the corporation was properly called upon to shew cause why such by-law should not be quashed. The 36th and 37th sections of this act recognise the authority of the court to quash such a by-law, by declaring that such authority shall not be exercised upon particular specified grounds.

It was then contended that there was a sufficient publication and notice, prior to the taking the poll, under the provisions of the statute.

The 5th section of the statute requires, that on receipt of any requisition such as was served in the present case, the clerk shall cause the requisition "to be published for four

consecutive weeks in some newspaper published weekly or oftener within the municipality, or if there is no such newspaper published in the municipality, then in some newspaper published as near thereto as may be; \* \* \* with a notice signed by him, signifying that on some day within the week next after such four weeks, at the hour of ten in the forenoon, and at some convenient place named in the notice, a meeting of the municipal electors of the municipality will be held, for the taking of a poll, to decide" whether or not the by-law is adopted.

It will be observed that the statute does not fix any number of insertions of the requisition and notice in a newspaper, but the publication for a fixed period, namely four consecutive weeks, "in a newspaper published weekly or oftener." According to the letter and the spirit of this provision, if there was only a daily newspaper published in the municipality the requisition and notice must be published in such daily newspaper for "four consecutive weeks;" and the length of time to elapse from the first insertion to the last must be the same whether the paper be published daily or weekly. If therefore the first publication was on Saturday, that week would expire on the following Friday, though there might be one or six insertions, according as the newspaper was published daily or weekly.

In this case the first publication was on Thursday, the 12th of January. The second week therefore began on the 19th, the third on the 26th, and the fourth on the 2nd of February; but by this mode of computation the last week would end on the 8th of February. The poll is to be taken on some day within the week *next after such four weeks*, and the notice is to name the day. Now the notice named Tuesday, 7th February, for the taking the poll, which was two days sooner than the statute authorized.

I should not have entered into so much detail on a matter which to my apprehension is so transparently clear, had not Mr. McKenzie so persistently argued for a different construction. As I understood him, he argues that every week begins on the first day thereof—that is, on Sunday—and ends on the following Saturday: that a publication on Thursday



is in the first week, and therefore for it, and so on for the next succeeding three Thursdays—so that on Saturday the 4th of February the four consecutive weeks expired, and then the poll was properly taken on the Tuesday following.

I do not adopt this mode of reckoning weeks, by giving a publication on Thursday relation back to the preceding Monday. If that argument be sound, a publication on the Saturday would have the same relation back, and the four weeks might begin to run before the requisition was delivered to the clerk of the Municipality, or even before it was prepared or signed by the electors; and it would also be sufficient, though the newspaper was published daily or three times a week, to publish once only during the first week, taking the last day for the first publication.

We think therefore that the first objection taken to this by-law must prevail, and this conclusion makes it unnecessary to determine whether it could possibly have been intended that the superior courts should be occupied in taking a scrutiny of votes, yea or nay, on any number of similar by-laws, with respect to which the question of their being passed by a "majority of duly qualified municipal electors" may be raised. A similar scrutiny does take place on a writ of summons in the nature of a *quo warranto*, under section 128 of the Municipal Institutions Act, but the authority to try those elections is vested in a single judge, to be exercised either in term or vacation, and practically the trials are in vacation. If these courts must take the scrutiny it can only be in term time, and the inconvenience to the ordinary and regular business of the court can hardly be overrated. We trust that it may be timely prevented by the interference of the Legislature. It may be added that with regard to the setting aside by-laws passed under this statute, it is rather assumed to exist than in terms given to the courts.

My brother *Hagarty* takes no part in this judgment.

MORRISON, J., concurred.

Rule absolute, with costs.

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## McINTOSH V. TYHURST.

*Seduction—C. S. U. C. ch. 77—Construction of.*

A widow, having an unmarried daughter, married the plaintiff, and took the daughter to her new home. While living there and performing acts of service she was seduced.

*Held*, that the step-father might maintain an action as at Common Law, though six months had not expired from the birth of the child, for it could not be said that the daughter was at the time of her seduction not living with her mother, but with "another person," within sec. 1 of the Seduction Act, and sec. 3 therefore did not apply.

Remarks as to the object and proper construction of the statute.

See *McIntosh v. Tyhurst*, 23 U. C. R. 565, which is in effect overruled by this decision, and *Green v. Wright*, ante, page 245.

This case was brought down for trial again at the assizes at Chatham, in April, 1865, before *John Wilson, J.*

The evidence as to the seduction was as on the former trial, which will be found reported in 23 U. C. R. 565. As to the relation of master and servant, the witness *Jessie Tolmie* stated that the plaintiff was her step-father: that she lived with him and worked for him as his servant: that he was married to the witness' mother, who lived in his house, and had lived there since they were married. She stated that the plaintiff was in Paris, but sometimes came home; he had been home three or four times in three years; he was not at home when the witness was confined, and had not been home from the February before. He and the witness' mother now lived together and agreed pretty well.

The jury again found for the plaintiff, with damages, \$200. The case was left to them as founded on the plaintiff's common law right as master for the loss of the services of his servant. The witness *Jessie Tolmie* was confined on the 10th of October, 1863, and this action was begun on the 23rd of February, 1864.

It was objected that as the mother of *Jessie Tolmie* was living in the province, the plaintiff could not sue on his common law right until the expiration of six months from the birth of the child. The objection was overruled.

*Becher, Q.C.*, renewed the objection, by moving for a new trial on the ground of misdirection in thus leaving the case to the jury.

*O'Connor* shewed cause, referring to *Green v. Wright*, 24 U. C. R. 245.

DRAPER, C. J.—I cannot bring myself to the conclusion, that the Legislature intended by the Seduction Act to subject the seducer to two separate actions, one at the suit of the parent, where the daughter seduced was at the time of the seduction serving or residing with another person upon hire or otherwise, and another at the suit of the person with whom she was residing or serving when seduced, and who at common law would have been entitled to recover for the loss of her services, if the statute did not intervene.

The first section of the statute gives a right of action to the father or the mother of the girl seduced which did not before exist—namely, the right to sue for the seduction of an unmarried daughter who was at the time of her seduction serving or residing with some other person; and in order to give effect to this provision, and to prevent a difficulty which would arise from the non-residence of the daughter with her parent who sues, the second section provides that where the action is brought by her father or mother proof of any act of service is unnecessary, but service shall be presumed, and no proof to the contrary shall be received; but the statute leaves the question of fact as to what would be an interruption of such service to rest on the same ground as it did before the statute was passed, and the jury may consider that service would in some degree be interrupted by pregnancy. Such is the doctrine of *L'Esperance v. Duchene* (7 U. C. R. 146).

The effect of the third section must be, either to restrain the master, to whom at common law the right of action for the seduction of his female servant would accrue, from bringing such action for six months after the birth of the child, in case her father or mother live in Upper Canada, and then, by implication, for it is not in words expressed, to leave the master free to assert his right of action against the seducer, in lieu of the latter being liable to an action by the parent under the first section, or to subject the seducer to both actions. To the second branch of the alternative I cannot subscribe.



Nor do I think that the Legislature, when they passed this act, had in view such a state of facts as exists in the present case—namely, the death of the father, leaving his wife and an unmarried daughter him surviving, the second marriage of the mother, who takes her daughter with her as an inmate of her new home, and the seduction of the daughter while living at the step-father's.

The intention which I assume the Legislature to have entertained—namely, to secure a prior right of action to the father or mother of the female seduced, and to postpone to it the common law right of action of a third party with whom such female resided as a servant when she was seduced—can hardly I think be held to extend to a case where the mother, to whom the statutory right of action is only given after the death of the father, marries a second time. I think it too much to say, in construing the first section, that on the facts appearing this girl Jessie Tolmie was not residing with her mother, and that, as the consequence, by the first and third section, the mother had for six months the prior right of action—treating the girl as residing with another person upon hire or otherwise. I prefer holding that this particular case does not fall within the letter or spirit of the act, and therefore that the step-father, whose servant she was, as she resided in his family doing acts of service, can maintain this action at common law, unaffected and unfettered by any provision of the statute.

If the seduction had taken place before the mother married the present plaintiff, a different question would have presented itself.

In my opinion this rule must be discharged.

My brother *Hagarty*, who heard the argument, concurs in this view.

MORRISON, J. concurred.

Rule discharged.

## TAYLOR V. ROSE ET AL.

*Nonsuit—Right to move against—Practice.*

Action upon a promissory note. Plea, fraud and want of consideration. At the end of the charge, in which the judge had expressed an opinion that there was some evidence to support the plea, the plaintiff's counsel desired him to charge in a particular way, and upon his declining to do so took a nonsuit. *Held*, (affirming the judgment of the County Court,) that having thus elected to be nonsuited, the plaintiff could not afterwards move against it.

Appeal from the County Court of the County of Wellington.

The action was brought by the plaintiff as indorsee of a promissory note made by the defendants.

The declaration contained only one count on the note, to which there was only one plea—that the defendants were induced to sign the note through fraud, &c., on the part of the payee, and without consideration, and that the plaintiff received the note with knowledge of the premises, and without consideration.

At the trial the defendants called witnesses to support their plea. The case closed without any objection; but at the end of the learned judge's charge to the jury, in which he had expressed his opinion that there was evidence to go to them in proof of the defendant's plea, the plaintiff's counsel desired the learned judge to charge in a particular way, and upon his declining to do so took a nonsuit.

In the following term the plaintiff obtained a rule *nisi* to set aside the nonsuit and for a new trial. The first ground stated in the rule was, that the plaintiff consented to be nonsuited out of deference to the opinion of the judge. The other ground referred to the want of proof to support the defendants' plea.

Upon the argument of the rule it was objected that the plaintiff having voluntarily elected to take the nonsuit, he was not in a position to have it set aside. The learned judge sustained the objection, and upon that ground refused to set aside the nonsuit, and discharged the rule *nisi*. Against that decision this appeal was brought.

*Robert A. Harrison*, for the appellant.

*S. Richards*, Q.C., contra, cited *Stuart v. Bullen*, 1 U. C. R. 451; *McGrath v. Cox*, 3 U. C. R. 332; *Vacher v. Cocks*, 1 B. & Ad. 145; *Simpson v. Clayton*, 2 Bing. N. C. 467; *Wood v. Bowden*, 23 U. C. R. 466.

MORRISON, J.—Upon the trial of the cause no motion was made for a nonsuit, nor did the learned judge suggest or direct a nonsuit or a verdict for defendants. The rule *nisi* was not moved for on the ground of misdirection, or the reception of improper evidence, or the rejection of evidence.

The case of *Simpson v. Clayton*, (2 Bing. N. C. 470,) is very like this case. There *Park, J.* was charging the jury and intimated a strong opinion on the evidence unfavorable to the plaintiff, and the plaintiff's counsel interposing without effect to obtain a direction in his favour, elected to be nonsuited. The nonsuit was moved against, and it was contended that it was a case of respectful acquiescence in the opinion of the judge, and not a case of election. *Tindal, C. J.*, in discharging the rule, says "The general rule is, that when in the progress of a trial the counsel for the plaintiff withdraws the question of fact from the consideration of the jury, and submits to a nonsuit, he cannot afterwards move to set aside a result of the cause which has been occasioned by his own act. \* \* One exception is, that if the learned judge who presides expresses a strong opinion that there should be a nonsuit, or gives the jury a wrong direction, and the counsel for the plaintiff yields for the time in deference to the judge, the Court will afterwards deal out to the plaintiff the same measure of justice as if the cause had gone on to an uninterrupted conclusion. That was the case of *Alexander v. Barker*, (2 Cr. & J. 133). \* \* So far is that from being the case here, upon either of the particulars to which I have referred, that the learned judge never directed a nonsuit, but was proceeding in his summing up when the counsel for the plaintiff, after one interruption, desired to be nonsuited rather than allow the case to go to the jury. That course therefore was the voluntary election of the plaintiff's counsel. I have heard of no wrong direction, nor of any evidence having been improperly rejected, but only that the learned



judge from time to time expressed an opinion on the evidence, as he was bound to do."

I also refer to *Austin v. Evans*, (2 M. & G. 430,) *Wilkinson v. Whalley*, (5 M. & G. 590,) and to *Magrath v. Cox*, (3 U. C. R. 332, where Sir *James Macaulay* reviews all the cases. In *Wilkinson v. Whalley* it was conceded that where a plaintiff elected to be nonsuited in consequence of misdirection as to the weight and effect of the evidence, he could not move to set aside the nonsuit; but it was submitted that a plaintiff might do so where the misdirection was as to the law. And *Cresswell*, J., in his judgment said, "I wish to add one word as to setting aside nonsuits. The doctrine has perhaps been carried a little too far. I do not accede to the rule, in its broad terms, that whenever a judge misdirects the jury upon a point of law, and the plaintiff thereupon *elects* to be nonsuited, he can afterwards move to set aside the nonsuit."—See also Baron *Wood's* judgment in *Ward v. Mason*, (9 Price, 291.)

Upon the strength of these authorities, I am of opinion that the judgment of the court below upon this point was correct, and that the appeal should not be allowed.

Upon the other points raised in the court below, and referred to in the argument, it is unnecessary to express any opinion. The question arising upon the construction and effect of the 26 Vic., ch. 45, is one of great importance, and by no means free from doubt. I am authorized to say that my brother *Hagarty*, who heard the argument, concurs in this judgment.

DRAPER, C. J., concurred.

Appeal dismissed with costs.

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## BURNS V. McADAM.

*Husband and wife—Separate estate—Lease—Conveyance.*

M. conveyed the land in question to J., the wife of R. R. alone executed a lease to the defendant, and died during the term, before his wife.

*Held*, that on R's death the term expired, and that the plaintiff, claiming under a conveyance from R. and his wife, could eject defendant without notice to quit or demand of possession.

The conveyance to the plaintiff was executed by the husband and wife at different places, but so far as appeared on the same day, and it was duly certified by two justices, under C. S. U. C. ch. 85.

*Held*, a sufficient execution by her "jointly with her husband."

EJECTMENT for village lots numbers three and four in the first range of Plante's section of the village of Renfrew. Defence for a part of the land, to wit, for the south-west halves of numbers three and four in Main Street of Plante's section in the village of Renfrew, extending backwards on the rear of said lots 105 feet, being the land specified in the lease from the late George Ross deceased to Eliza McAdam, the defendant. Writ issued 27th August, 1864.

The plaintiff's claim of title to number three was under a deed of bargain and sale from George Ross and Jessie Ross to himself; and to lot number four under a deed from James Morris to himself.

The defendant asserted title by lease from George Ross, deceased, and she gave notice limiting her defence to the south-west halves of lots numbers three and four.

The trial took place at Ottawa, in April, 1865, before *Morrison, J.* A number of deeds, beginning with the grant from the Crown, which bore date 27th February, 1829, were put in evidence. It appeared that on the 29th of January, 1847, one Plante was seized in fee of the two lots in question, and on the 14th of May, 1849, he conveyed number three to James Morris in fee, who on the 16th of May, 1849, conveyed that lot to his daughter Jessie, then the wife of George Ross.

On the 22nd of May, 1848, Plante conveyed number four in fee to one David Airth, who on the 16th of October, 1856, conveyed that lot to one James Morris the younger, the brother of Jessie Ross.

On the 6th of May, 1863, James Morris executed a conveyance in fee of both lots three and four to William P.

Morris, and he on the 20th of June following executed a conveyance in fee of the same two lots to James Morris.

On the 31st of August, 1863, James Morris executed a conveyance in fee of these two lots to the plaintiff; and on the 19th of September, 1863, George Ross and Jessie his wife executed a conveyance in fee of these two lots to the plaintiff. Ross executed this deed at Renfrew, and his wife at the city of Ottawa. Her execution was duly certified, according to the statute enabling married women to convey their real estate, by two justices of the peace.

On the first day of February, 1862, George Ross executed a lease of that part of the premises defended for to the defendant, to hold for five years from the date.

George Ross died in February, 1864, leaving his widow Jessie and one son surviving him. The widow was said to have been about forty years old.

It was objected, on the part of the defendant, that the deed of the 19th September, 1863, was not executed according to the statute, (Con. Stat. U. C. ch. 85,) because Jessie Ross did not execute the deed "jointly with her husband." The objection was overruled. It was further objected that the defendant entered lawfully as tenant under the lease from George Ross, and was therefore entitled to a notice to quit or a demand of possession.

The learned judge thereupon nonsuited the plaintiff, reserving leave to him to move to enter a verdict for him.

*O'Brien* obtained a rule *nisi* on the leave reserved, or to enter a verdict for the plaintiff for the front-half of number four, and for a new trial as to the front half of number three, or for a new trial generally—among other grounds, because George Ross was not shewn to have reduced his wife's lands into possession before the execution of the lease to the defendant, and that no notice to quit or demand of possession was necessary. He cited *Robinson v. Smith*, 17 U. C. R. 218; *Scouler v. Scouler*, 19 U. C. R. 106; *Doe Martin v. Watts*, 7 T. R. 83; *Doe Thomas v. Roberts*, 16 M. & W. 778; *Woodf. L. & T.* 178-9.

*Robert A. Harrison* shewed cause.



DRAPER, C. J.—I do not understand upon what ground the lease of the 1st February, 1862, was made by George Ross for any part of lot number four. Jessie Ross, his wife, was seized in fee of number three, but not of number four, the title to which was not acquired by the plaintiff from them, though it was included in their deed to him.

The lease of the south part of number three was made by George Ross alone. He and his wife during their joint lives were seized in fee simple of this lot, in right of the wife, or, as expressed by Lord Westbury, C., in *Gleaves v. Paine*, (9 Jur. N. S. 367,) they were “seized as tenants by entireties of the fee simple in right of the wife.” But the husband acting alone could affect no greater interest than was vested in him, which was only during the joint lives of himself and his wife, and if he had survived her for his own life, as he would have become tenant by the courtesy. On his death, therefore, leaving his wife surviving him, the term created by him came to an end, and his lessee I apprehend became a tenant at sufferance, and was neither entitled to a notice to quit nor to a demand of possession. The present plaintiff is not shewn to have done anything subsequent to the death of George Ross to set up the lease, or to recognise defendant as his tenant.

The only remaining question is whether number three vested in the plaintiff by force of the deed of the 19th of September, 1863. I am of opinion that it did. The statute certainly requires that a conveyance by a married woman of her separate estate must be executed *jointly* with her husband, but I do not understand this necessarily to mean in her husband's presence. The evidence shews that she executed the deed on the day on which it bears date, and as nothing to the contrary appears, it will be presumed that the husband executed it on that day also. If so, there is sufficient evidence that the wife executed jointly with her husband.

In my opinion therefore the rule to set aside the nonsuit should be made absolute, and the verdict should be entered for the plaintiff pursuant to the leave reserved.

My brother *Hagarty* takes no part in this judgment.

MORRISON, J. concurred.

Rule absolute.

GOSSAGE V. THE CANADIAN LAND AND EMIGRATION  
COMPANY.*Appeal.*

At the trial of a cause it was agreed, as stated in the judge's notes, that the court might draw inferences of fact as a jury, or refer to an arbitrator any questions on which they might find the evidence insufficient; and a verdict was taken for the plaintiff, subject to be reduced or entered for the defendant. Judgment was given for the plaintiff, and on motion to allow an appeal bond, in a penalty of £100, it was objected that no appeal would lie, and that if it would the bond should be not merely for costs, but to secure the amount of the judgment.

*Held*, that these objections must be decided by the court above, and the appeal bond was allowed as a security to the satisfaction of this court. *Semble*, however, that it was sufficient in amount, the case being one in which, under C. S. U. C. ch. 13, sec. 16, sub-sec. 4, there was no stay of execution.

This case was left at the trial to the decision of the court above, with power to draw conclusions of fact from the evidence, and to settle the amount of damages to be recovered if the court sustained the plaintiff's action.

The argument took place in Easter Term, 27 Vic. and on the first day of Trinity Term judgment was given in the plaintiff's favour, ordering the verdict entered at *nisi prius* to be reduced to \$8298.74, and judgment was subsequently entered as on an ordinary verdict for plaintiff, upon the issues on the record.

In Hilary Term last *Adam Crooks*, Q.C., applied for a rule calling on the plaintiff to shew cause why the judgment roll should not be amended by inserting the special case and the facts stated, proved and agreed upon, and subject to which the verdict was really entered at *nisi prius*, and by entering the judgment upon such special case. The object of the motion was to put the record into such shape that on appeal from the decision the Court of Appeal would have power to correct the conclusions of fact drawn by this court as well as the conclusions of law.

This application was resisted in the first instance by *Gwynne*, Q.C., for the plaintiff, who insisted that there never had been any special case made, and the court could not now make one, the plaintiff not consenting. He relied on the arrangement at the trial as set out in the judge's

notes, as follows: "Both parties agree the court may draw inferences of fact as a jury might do, or that if the court shall find the evidence insufficient to enable them to decide any particular question or questions of fact, they may refer such questions, or any of them, to such arbitrator and in such manner as they shall deem best. Then the verdict is to be entered for the plaintiff for \$12,716.15, subject to the opinion of the court, who may order the same to be reduced or a verdict to be entered for the defendants. Any arbitrator to whom a question of fact is referred to make his report to the court, which report is to form part of the case on which the court is to base its final determination."

After consideration the court refused to grant the rule.

On the first day of this term *Adam Crooks*, Q.C., obtained a rule *nisi* for the allowance of the appeal bond, which he produced, together with the necessary affidavits. The bond was in a penalty of £100.

*Gwynne*, Q.C., shewed cause, contending that no appeal would lie in this case: that it was premature to allow the bond before the appeal was actually made; and that, if an appeal would lie, the bond should be not for costs only, but also to secure the amount of the judgment. He cited *Brown v. Overholt*, 14 U. C. R. 64; *Cinqmars v. Moodie*, 15 U. C. R. 610, note; *Fryer v. Roe*, 12 C. B. 437; *Kingsford v. Merry*, 5 W. R. 152; *Seeger v. Duthie*, 9 W. R. 166; *Allen v. Smith*, 11 W. R. 440; *Whitmore v. Insurance Society*, 3 L. T. Rep. N. S. 321; *Feary v. Abbott*, 6 Jur. N. S. 1100; *Consol. Stat. U. C. ch. 13*; 20 Vic. ch. 5.

*Galt*, Q.C., supported the rule, citing *Withers v. Parker*, 4 H. & N. 810; *Abbott v. Feary*, 6 H. & N. 113; *Levy v. Green*, 28 L. J. Q. B. 319.

DRAPER, C. J.—The 15th section of the Appeal Act, (*Consol. Stat. U. C. ch. 13*), enacts, that no appeal shall be allowed until the appellant has given proper security to the extent of \$400, to the satisfaction of the court from whose judgment, &c., he is about to appeal, that he will effectually prosecute his appeal, and pay such costs and damages as



may be awarded in case the judgment, &c., appealed from be affirmed. And (sec. 16) on the perfecting such security execution shall be stayed in the original cause, except in certain cases. And this case clearly comes within the fourth exception, and as the terms of this exception are not complied with the execution of the judgment is not stayed, though the security under the 15th section is given.

The question whether the appeal should be heard or should be quashed belongs in our opinion to the court above. The cases of *Withers v. Parker*, *Abbott v. Feary*, and *Levy v. Green*, cited on the argument, shew this.

We shall only allow the bond as being a security to our satisfaction. No exception appears to its form, as a bond for \$400, nor to the sufficiency of the obligors. In thus deciding, we neither hold the case to be one in which appeal lies, nor if it does that a larger security should not be given, though, as there is no stay of execution, my present impression is that the amount is sufficient under the statute.

My brother *Hagarty* takes no part in this judgment.

MORRISON, J. concurred.

Bond allowed.

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### REGINA V. THE TORONTO STREET RAILWAY COMPANY.

*Toronto Street R. W. Co.*—24 Vic. ch. 83, sec. 6—*Indictment under.*

Defendants' Act of Incorporation required that "the rails of their Railway shall be laid flush with the streets and highways, and the Railway track shall conform to the grades of the same so as to offer the least possible impediment to the ordinary traffic of the said streets and highways."

*Held*, that an omission to lay the rails flush with the street would be indictable, without shewing that any unnecessary impediment was offered to the traffic.

The defendants were indicted, for that after the passing of the act, (24 Vic. ch. 83,) entitled "An act to Incorporate the Toronto Street Railway Company," they constructed a railway, within the meaning of that act, along a certain common public highway called Yonge Street, and having so

constructed the said railway, the defendants used the same, and when they so constructed it, to wit on the 1st January, 1862, unlawfully and injuriously omitted and neglected to lay the rails of the said railway flush with the said street, and then and hitherto have unlawfully and injuriously, and contrary to the said statute, suffered and permitted and continued to suffer and permit the said railway to be out of repair and order, and the rails thereof to be much above the grade and level of the said street, and so the same have remained hitherto, so that the liege subjects could not pass, &c., to the common nuisance, &c.

The indictment was removed by certiorari into this court, and the defendants pleaded not guilty, and the trial took place at the Assizes for York and Peel, in January, 1864, before *Morrison, J.*

The evidence for the prosecution was limited to that part of Yonge Street north of the first toll gate, and mainly to that part of the railway nearest to the toll gate. This part of the railway had been laid down under an agreement with the Municipality of Yorkville, made in pursuance of the fourteenth section of the statute, but it was insisted that the defendants had not complied with the terms of such agreement. At the suggestion or request of the York Roads Company, the rails were laid on the west side of Yonge Street, avoiding interference with the central part, which was macadamized. Yonge Street was highest in the centre, sloping very gradually to the sides. On the west side there was a gutter or shallow ditch for the surface water to run off. The western rail was laid very near the edge of this gutter, and according to some of the evidence was from one to three inches above the level of the ground outside the railway. It appeared that the two rails could not be laid level without raising the western rail above the level of the street or sinking the eastern rail below it. So far as this western rail affected the convenience of persons using wheeled vehicles, there was an impediment to the ordinary traffic.

The learned judge told the jury that if the rails were not at the first completion of the railway laid down flush with

the highway to find for the Crown, whereupon they returned a verdict of guilty.

In Hilary Term, 27 Victoria, *M. O. Cameron*, Q.C., obtained a rule calling on the Attorney-General to shew cause why the verdict should not be set aside and a new trial had, the verdict being contrary to law and evidence, and for misdirection, in telling the jury that if the railway were not in any part of the street or road laid flush with the road, although no obstruction was occasioned thereby to the public, an indictment would lie upon the defendants' act of incorporation; and on grounds disclosed on affidavits and papers filed.

*S. Richards*, Q.C., shewed cause during this present term, citing *Rex. v. Harris*, 4 T. R. 202; *Regina v. Price*, 11 A. & E. 727; *Regina v. Birmingham, &c., R. W. Co.*, 3 Q. B. 233; *Regina v. Great North of England R. W. Co.*, 9 Q. B. 315; *Rex v. Inhabitants of Kent*, 13 East, 220; *Rex v. Inhabitants of Lindsay*, 14 East, 318; *Regina v. Grand Trunk R. W. Co.*, 15 U. C. R. 121; *Russell on Crimes*, 45, 46; *Dickenson*, Q. S. 310.

DRAPER, C.J.—I have not seen any affidavit, nor does it appear on inquiry that there are any on the files. During the argument no allusion was made to any, nor were affidavits filed on shewing cause by the counsel for the prosecution.

There was some evidence to go to the jury of a nuisance, for there was proof that the road was not as free in all respects for the public use as it had been before the railway was constructed, and there certainly was evidence that the defendants had not complied with the sixth section of the statute.

As to the misdirection complained of, the learned judge's report does not agree with the statement in the rule. The direction was founded on the sixth section, which requires that the rails of the railway "shall be laid flush with the streets and highways, and the railway track shall conform to the grades of the same so as to offer the least possible impediment to the ordinary traffic." The question submitted



to the jury was whether the rails were so laid, *i.e.*, flush with the highway, and if not they were told to convict; and this direction is in accordance with the words of the statute. The qualification of offering the least possible impediment to the ordinary traffic relates to the direction that the railway track shall conform to the grade of the highway, and not to the preceding words, that "the rails of the railway shall be laid flush with the streets and highways."

That a disregard of or non-compliance with a positive command in an Act of Parliament is indictable as a misdemeanour appears from the cases cited by Mr. *Richards*, and from the passage referred to in Hawkins, P. C. Bk. 2, ch. 25, sec. 4:—"And it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."

The finding of the jury, upon the direction given, affirms a breach by the defendant of the command of the statute, that the rails shall be laid flush with the street. This command was doubtless given, with others, to secure the public convenience in the use of the street, and a breach of it is, according to the authorities, indictable.

I think therefore there was no misdirection, and that the conviction is sustained in law as in fact.

The rule must therefore be discharged.

My brother *Hagarty* takes no part in this judgment.

MORRISON, J. concurred.

Rule discharged.

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## THE QUEEN V. McLEOD.

*Recognizance—Relief under C. S. U. C., ch. 117, Sec. 11.*

Defendant having entered into a recognizance to appear at a certain assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him, of a breach of the Foreign Enlistment Act, was not intended to be prosecuted. He was however called, and his recognizance estreated.

The court, under the circumstances, relieved him and his sureties, under C. S. U. C. ch. 117, sec. 11, on payment of costs and on his entering into a new recognizance to appear at the following assizes.

*Carrall* applied, under Consol. Stat., U. C., ch. 117, sec. 11, to relieve defendant and his sureties, whose recognizance had been estreated.

It appeared that the defendant had entered into a recognizance, with two sureties, to appear at the last assizes for the County of Kent. He made an affidavit that he did so attend from the first to the last day, and that no indictment was found by the Grand Jury against him, and he left the court on the last day, but before the rising of the court, assuming that the charge against him, of a breach of the Foreign Enlistment Act, was not intended to be prosecuted. However, he was called upon, not long before the court rose, to give recognizance to appear at the following assizes, the Crown, as was stated, not being ready to proceed, owing to the absence of a material witness. As the defendant did not answer, his recognizance, and that of his sureties, was estreated, and executions had been placed in the sheriff's hands. He now applied for relief, stating his readiness to give security to appear at the ensuing assizes.

DRAPER, C. J.—We think that under the Consolidated Statutes of Upper Canada, ch. 117, sec. 11, we may properly relieve the defendant and his sureties, upon his entering into a new recognizance, himself in \$200, with two sureties, each in \$100, to appear at the next assizes for the County of Kent, to answer to any charge that may be made against him, and upon payment of the costs attending the estreat, sheriff's fees, &c.; such recognizance to be entered into before the Police Magistrate of Chatham, or before two Justices of the Peace for the County of Kent, who will ascertain the sufficiency of the sureties.

*Per Cur.* Rule accordingly.

IN THE MATTER OF LOUISA PARK, WILLIAM HERVEY PARK, ALMIRA ELIZA PARK, FREDERICK WALLACE PARK, NANCY JANE PARK, AND CALVIN AXFORD PARK, DEMANDANTS FOR PARTITION—AND SAMUEL HUNT PARK, RESPONDENT.

*Partition—Rule of Court 112.*

In 1855 the widow and children of one of two joint owners of land, petitioned for a partition under 2 W. IV ch. 35, the other owner being respondent. In the same year a partition was made under a writ directed to the Sheriff, the return and plan were filed, and a rule to record and confirm it was moved for, but by some mistake this rule never issued, and there was no official entry of its having been either granted or refused. In 1860, the respondent died. The partition thus made had always been acquiesced in, the parties supposing that it had been confirmed.

*Held*, that the Court could not now, even by consent, examine and confirm such partition, for it would in effect be giving judgment against a party (the respondent) several years dead, and the proceedings would be void. Attention called to the rule of Court 112, requiring affidavits to be divided into paragraphs.

*Becher Q. C.*, obtained a rule calling upon Elizabeth Nugent, the widow and administratrix of the respondent, Samuel Hunt Park, and her present husband, Thomas Nugent, and on William Elliott and John Wesley Van Wormer, administrators of the said Samuel Hunt Park, and also his children and co-heirs at law, namely, William Jones Park, Elizabeth Abigail Elliott, wife of William Elliott, Samuel Axford Park, and Sarah Park, and on John Wesley Van Wormer and Mary Ann Van Wormer, guardians of the said Samuel Axford and Sarah, who are infants, to shew cause why the writ of partition, the finding of the inquest, the plan and field notes of the land divided in this matter between the parties, with the sheriff's return to it, all returned to this Court in Michaelmas Term in the year 1855, should not be examined by this Honorable Court, and confirmed and entered of record of this Honorable Court, that the partition thereby made may be made valid and effectual in law.

This rule was drawn up on reading the affidavit of the attorney for the demandant, and the writ of partition, with the return and other papers filed.

The affidavit filed on making this motion stated that the partition made by the freeholders summoned by the sheriff of the County of Middlesex under the writ of partition to him directed, and by him returned to this court in the



year 1855, with the said writ, had always been acquiesced in since the making thereof by all the said parties, and by the representatives of the said Samuel Hunt Park hereinafter named since his death, and the possession hath always been according to such partition since the making thereof, as the deponent verily believes. 2. That until some few months since all the parties concerned believed the said partition was confirmed by this court. 3. That since the making of the partition the said Louisa Park and Samuel Hunt Park had died. 4. Deponent is informed and believed Samuel Hunt Park died intestate. 5. That all the demandants, other than the said Louisa Park, are yet living. 6. That the following are the lawful children and co-heirs at law, as deponent is informed and believes, of Samuel Hunt Park: viz. : William Jones Park, Elizabeth Abigail Elliott, wife of William Elliott, Samuel Axford Park and Sarah Park, the last named two of whom are infants and have guardians appointed by the Surrogate Court, who are John Wesley Van Wormer and Mary Ann his wife. 7. That the Respondent left a widow, who is still alive, and who was appointed his administratrix, and released her dower in the part of the premises partitioned to her husband, to and among his children, as deponent is informed and believes. 8. That deponent knows of no claim ever having been made adversely to the partition, and he believes none has been made or exists.

*Christopher Robinson, Q.C.*, on the last day of term appeared for the parties who had been served with the rule—that is, for Elizabeth Nugent and her husband Thomas Nugent, for John Wesley Van Wormer and Mary Ann his wife, guardians of Samuel Axford Park and Sarah Park, for Elizabeth Abigail Elliott and William Elliott her husband, for Samuel Axford Park and William Jones Park, and Sarah Park.

He filed an affidavit made by William Elliott, that Samuel Hunt Park died in the month of October in the year 1860, and intestate, as he verily believes: that the letters of administration issued from the Surrogate Court of the County

of Middlesex on the 22nd of December, 1860, appointing Elizabeth Park widow of the said Samuel Hunt Park, now Elizabeth Nugent wife of Thomas Nugent, administratrix, and John Wesley Van Wormer and the deponent administrators, of the estate and effects of Samuel Hunt Park : that Samuel Hunt Park left William Jones Park, Elizabeth Abigail Park, Samuel Axford Park and Sarah Park : that the said William Jones and Elizabeth Abigail are each of the age of 21 years : that Samuel Axford and Sarah are minors, and John Wesley Van Wormer and Mary Ann his wife are their guardians : that the partition made in this case has always been acquiesced in by all the parties in this matter, and by the representatives of the said Samuel Hunt Park since his death, and it is to the interest of all that the same should be legally confirmed : that he knows of no conveyance, act, matter or thing done or suffered since the said partition in any way at variance or conflicting therewith by any of the parties mentioned, nor has he heard of anything conflicting therewith done or suffered by them or any person or persons whomsoever : that Samuel Hunt Park had no other children than those he has named, as he believes, and he never heard that he had any. *C. Robinson* consented, on behalf of the parties whom he appeared for, that the rule might be made absolute.

DRAPER, C. J., delivered the judgment of the court.

We had this case before us in Michaelmas Term last, on a motion for a rule ordering the clerk to record the return made to the writ of partition in the matter with the map and field notes, and confirming the said partition and making it valid in law, and that such record, order and confirmation should be made and entered as of Michaelmas Term 1855.

The facts appear to be as follows : William Axford Park and Samuel Hunt Park were seized in fee, either as joint tenants or as tenants in common, of the south half of lot number eleven in concession C. in the Township of London. On the 16th of June, 1852, William Axford Park died. In 1855, his widow, Louisa Park, and his children

petitioned for a partition, the widow having a life estate. Samuel Hunt Park was the respondent, and in September, 1855, a writ of partition was issued directed to the Sheriff of Middlesex, under the Statute of U. C., 2 W. IV., ch. 35, returnable on the first day of Michaelmas Term then next. The sheriff returned the writ with the report and map of the freeholders appointed by the court, which shewed the partition they had made. The return with the report and map annexed was filed in that term, and a motion made for a rule ordering the clerk to record the return, making the record valid and effectual in law for the partition of the lands, but no rule of court issued, nor is there any official entry or memorandum that the motion was granted or refused.

The court, after consideration, refused to grant the rule asked for, as they could find no authority either in the statute or under their common law authority to warrant such a proceeding. The nearest analogy was the allowing judgment to be entered *nunc pro tunc*, but there is a very obvious difference between the cases, for all the authority the court has is derived from the statute, and it would have been difficult to treat the delay as the act of the court, which is the ground on which the relief sometimes given in regard to entering judgments *nunc pro tunc* is principally rested.

The present rule asks only that the court will now examine the writ of partition and the return, which has remained on the files since November, 1855. If we grant this motion, the clerk will now record the return, and it will thenceforth be deemed valid and effectual in law for the partition, if the court can legally grant the rule.

The delay in applying is sworn to have arisen from the fact, that it was understood by the petitioner's counsel that the court had granted his motion, and he drafted a rule, which he handed to the clerk, and assumed that it had been signed and filed among the papers. Not long before last Michaelmas Term it was discovered that the clerk had not signed the rule. I presume that in strictness it should have been taken out and served. The eighth section seems to



contemplate the taxation of costs, and possibly the words "shall record such return," mean that a roll should be carried in, on which the proceedings are entered, down to the judgment. The fourth section of the Statute, 2 Wm. IV., countenances this view.

Since Michaelmas 1855, in October 1860, Samuel Hunt Park died.

And now we are virtually asked to enter what is in the nature of a judgment affecting the title to real estate, between four and five years after the sole respondent or defendant is dead. Our judgment if effectual will sever the tenancy, which till that judgment is given has continued.

We have examined the return with the papers annexed thereto, and we see no reason to doubt that the partition was justly and accurately made, and we are very desirous, if it could be done, to confirm it.

But the difficulty appears to us to be insurmountable, and we think that if we granted the application the proceedings would be void, for we should be giving judgment against a party several years dead.

In our opinion the rule must be discharged.

I may add that the affidavits filed are not divided into paragraphs, as required by Rule of Court number 112, and that we shall find it necessary to enforce this rule by refusing to receive affidavits not in accordance with it.

Rule discharged.

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## PENTLAND V. HEATH.

*Appeal from County Court—Form of bond—C. S. U. C., ch. 15, sec. 68; 27 Vic. ch. 14.*

The condition of the bond required on appeal from the County Court must be that *the appellant* shall abide by the decision of the court appealed to, and pay, &c.; and where the condition was that *the sureties* should abide, &c., and the appellant did not join in the bond, the appeal, which had been entered for argument, was struck out of the paper.

*Quære* as to the effect of Consol. Stat. U. C., ch. 15, sec. 68, as amended by 27 Vic. ch. 14.

APPEAL from the County Court of Northumberland and Durham.

This appeal was set down for argument last Hilary Term, and was being heard, when *Moss*, for the respondent, submitted that as final judgment had been signed in the cause in the court below, which statement was supported by an affidavit, the appeal could not be heard; and on the application of the appellant's counsel the case was permitted to stand until he had ascertained the state of the cause in the court below.

On the first day of this term *McMichael* filed an affidavit, shewing that the final judgment had been set aside by an order of the judge of the County Court, and by leave of this Court the appeal was entered on the paper for argument.

On the fourth day of this term *Moss* obtained a rule nisi calling upon the appellant to shew cause why the appeal should not be struck out from the paper, with costs, on the ground that the appellant had not filed such a bond as the statutes in that behalf required, or any sufficient bond.

From the affidavits filed on the application, it appeared that the cause in the court below was tried at the sittings held in the month of December last, and that a verdict was rendered for the respondent for \$75: that a rule nisi to set aside the verdict was moved for in the ensuing term of the County Court, which was refused, and against that decision the appellant gave notice of appeal:—that the usual time was given to appeal, and that a bond was filed, which bond—after reciting that an action was depending between the parties, &c., and the intention of the defendant to appeal in the manner provided for by the Consol. Stat., U. C. ch. 15,

and by the act 27 Vic., ch. 14, and that George M. Goodeve and H. Covert (two sureties) had agreed to enter into the bond for the purpose of giving the security required by the statutes referred to, for the costs of the suit, the costs of the appeal, and the amount of the judgment if dismissed—was conditioned that if the above bounden *G. M. G. and H. C., or either of them, shall abide by the decision* of the said cause by the court of Queen's Bench so to be appealed to, and shall pay to the said (respondent) his executors, &c., all sums of money and costs, &c., awarded and taxed to the said (respondent), also, in case the said appeal be dismissed, pay to the said (respondent) his executors, &c., the sum of \$75, then this obligation shall be void, otherwise in full force:—that the plaintiff's attorney, considering that the bond did not conform to the statutes, signed final judgment in the court below on the 9th of January last: that last term the appeal was set down for argument in this court: that the respondent shewing that final judgment had been signed, this court refused to hear the appeal: that in consequence of such refusal the appellant made application to the judge of the court below to set aside the judgment so entered: that an order was made setting it aside, the appellant undertaking not to file any new or other appeal bond but the one originally filed, and that the suit should remain in the same plight and condition, saving only the setting aside of the judgment.

A copy of the bond was attached to one of the affidavits, by which it appeared that the appellant did not join in the bond.

*McMichael* shewed cause, citing *Lord Ward v. Lumley*, 6 Jur. N. S. 560; *Kingsford v. Merry*, 3 Jur. N. S. 68; *Cannon v. Johnson*, 21 L. J. Q. B. 164; *Daniels v. Charsley*, 21 L. J. C. P. 37.

*Moss* supported the rule, and cited *Tozer qui tam v. Preston*, 23 U. C. R. 310; *Simpson v. The Great Western R. W. Co.*, 17 U. C. R. 57; *In re Keenahan and Preston*, 21 U. C. R. 461.



MORRISON, J. delivered the judgment of the court.

The amendments made by the 27 Vic., ch. 14, to the Consol. Stat. U. C. ch. 15, have rendered the construction to be given to the latter act any thing but clear, and this court in *Tozer qui tam v. Preston* (23 U. C. R. 310) had much difficulty in arriving at any satisfactory conclusion.

Here the defendant in the court below is appellant. If we read the 68th section of chapter 15, as amended by the amending act, it is very doubtful, in my judgment, whether the section as amended can be construed to have any other meaning or effect, as to who should join in the appeal bond, than it had before the amendment, namely, the appellant and the two sureties.

From the preamble of the 27 Vic., it would appear that the amendments were only applicable to cases in which the appellants were plaintiffs. It does not say that it is expedient that the appellant should not be required to join in the bond. In any view of the statute we think we cannot construe the section to mean that the appeal bond to be given should contain any other condition than that the appellant should abide by the decision of the court appealed to and pay, &c. The condition of the bond here objected to is, that the sureties shall abide, &c., and pay, &c. Upon that ground we think the bond is defective, and that the rule should be made absolute.

Rule absolute.

## McDERMOTT ET AL. V. WORKMAN ET AL.

*Covenant on mortgage—Plea, prior mortgage by plaintiff fraudulently concealed—Replication, discharge of such mortgage.*

To a declaration on the covenant to pay, contained in a mortgage of lands for the balance of purchase money, defendant pleaded a prior mortgage to B., executed by the plaintiff, and fraudulently concealed from him, which had afterwards been foreclosed, and defendant ejected. The plaintiff replied, in substance, that the mortgage sued on had been assigned to D., for whose benefit the plaintiff was suing, and that, before this action, by indenture between D. and the prior mortgagee, of which defendant had notice, such prior mortgage "was released and discharged."

*Held*, on demurrer, that the replication was good, for D., the beneficial plaintiff, having procured the discharge of B's mortgage, had removed the only objection urged by defendant, and was in a position to give him a good title.

DECLARATION, on defendants' covenant to pay the plaintiff £300 with interest.

*Plea* on equitable grounds, that the said covenant in the said declaration mentioned is contained in a certain indenture of mortgage made between the defendants and the plaintiffs, securing the payment of the sum of money therein mentioned upon the lands therein described, being, &c., (describing the lands), which said mortgage was executed by the defendants in favour of the plaintiffs in payment of the balance of the purchase money of the said lands, which the defendants had theretofore purchased from the plaintiffs, and which the plaintiffs had conveyed to the defendants in fee. And in and by the said conveyance the plaintiffs covenanted with the defendants, that they then had in themselves good right, full power, and absolute authority to convey the said lands, and other the premises thereby conveyed, or intended so to be, with their and every of their appurtenances, unto the defendants, in the manner thereby conveyed; and that it should be lawful for the defendants, their heirs and assigns, from time to time, and at all times thereafter, peaceably and quietly to enter upon, have, hold, occupy, possess and enjoy the said lands and premises thereby conveyed or intended so to be, with their and every of their appurtenances; and to have, receive and take the rents, issues, and profits thereof, and of every part thereof, for them and their use and benefit, without any let,

suit, trouble, denial, eviction, interruption, claim or demand whatsoever of, from or by them, the said plaintiffs, or their heirs, or any other person or persons whomsoever; and that free and clear, and freely and absolutely acquitted, exonerated, and for ever discharged, or otherwise by the said plaintiffs or their heirs well and sufficiently saved, kept harmless and indemnified, of, from, and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust entail, will, statute, recognisance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble, and encumbrance whatsoever; and that the plaintiffs, their heirs, executors and administrators, and all and every other person whomsoever, having or claiming, or who shall or may thereafter have or claim any estate, right, title, or interest whatsoever, either at law or equity, in, to, or out of the said land and premises thereby conveyed, or intended so to be, or any of them, or any part thereof, by, from, under, or in trust for them or any of them, should and would from time to time, and at all times thereafter, upon every reasonable request, and at the costs and charges of the defendants, their heirs and assigns, make, do and execute, or cause to be made done or executed all such further and other lawful acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the better, more perfectly, and absolutely conveying and assuring the said lands and premises thereby conveyed, or intended so to be, and every part thereof, with their appurtenances, unto the defendants, their heirs and assigns, in manner aforesaid, as by the defendants, their heirs or assigns, or their counsel in the law, shall be reasonably devised, advised or required, so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors and administrators only, and so as no person who should be required to make or execute such assurances, shall be compellable for the making or executing thereof to go or travel from his usual place of abode.



And the defendants allege, that the plaintiffs had before the making of the said covenants executed a mortgage in fee of the said lands (with other lands) to the Bank of Upper Canada, securing the sum of £10,000, which then remained unpaid and in full force, and the said Bank of Upper Canada afterwards, and before the commencement of this suit, filed a bill in Chancery against the plaintiffs and the defendants and other parties, and therein proceeded to a final foreclosure of the said mortgage; and the said Bank of Upper Canada also brought an action of ejectment against the defendants, and thereby ejected and evicted the defendants and their tenants from the possession of the said lands, and entered into possession thereof, and of the rents and profits thereof, and still remain in possession thereof. And the defendants say that the plaintiffs fraudulently concealed from the defendants the existence of the said mortgage, and by such concealment and the false representations made by the plaintiffs that the said lands were free from any encumbrance by them created, induced the defendants to purchase the said lands, and to pay to them in cash a portion of the said mortgage money, and to execute the said mortgage to secure the residue of the said purchase money. And the defendants say that the said plaintiffs ever since the said foreclosure proceedings and eviction have been and still are wholly insolvent, and the defendants always have been and still are unable to recover from the plaintiffs the damage by them sustained by reason of the said plaintiffs' breach of covenant aforesaid, or the balance of the said purchase money so secured by the said mortgage as aforesaid—wherefore the defendants say that the plaintiffs ought not to recover from the defendants the said sum of money in the declaration mentioned.

*Replication*, on equitable grounds (after a previous replication denying the fraud,)—that the said deed in the declaration mentioned, and the premises thereby conveyed, and the moneys thereby covenanted to be paid to the said plaintiffs, were by the said indenture of bargain and sale by way of assignment, dated the first of October, 1857, and before the alleged proceedings to foreclosure and in eject-

ment in the said plea mentioned, conveyed, assigned, and made over to one Hartley Dunsford, absolutely, for a valuable consideration then and theretofore paid by the said Hartley Dunsford to the said plaintiffs; and the said indenture was duly registered in the proper county where the said lands lie, on the fifteenth day of the said month; and the said Hartley Dunsford had not any notice or knowledge of any of the alleged facts or circumstances in the said plea set forth as matters of defence before or at the time that such indenture was executed and payment made, and at the time of such indenture being executed the said plaintiffs ceased to be and the said Hartley Dunsford became and has ever since continued under such indenture entitled to the said deed firstly mentioned herein, and the lands and moneys therein referred to and comprised; and this action is brought for the sole benefit of the said Hartley Dunsford, and not for the benefit of the said plaintiffs, and the said Hartley Dunsford claims the benefit of being a *bonâ fide* purchaser for valuable consideration, without notice, as aforesaid.

And the plaintiffs further say at the time of the execution of the conveyance of the land from the plaintiffs to the defendants as in the said plea mentioned, the defendants had notice of the prior mortgage to the Bank of Upper Canada in the said plea mentioned, and the same was in fact duly registered in the proper county where the said lands lie long before the said conveyance from the plaintiffs to the defendants was executed; and after such notice of the said prior mortgage the said defendants went into possession of the said lands, and remained for a long time in such possession, and performed acts of ownership thereon, and did also execute to the plaintiffs an indenture of mortgage to secure to the plaintiffs upon the said land the payment of the sum of £300, with interest; and the defendants thereby covenanted with the plaintiffs, their heirs and assigns, that they, the defendants, had in themselves at the date of the said indenture good right to grant, bargain, sell and convey the said lands and premises unto the said plaintiffs, their heirs and assigns, according to the true intent and meaning of the said indenture; and the money secured by the said mortgage is

still unpaid, and the same is the deed in the declaration mentioned—whereby the defendants have confirmed and acquiesced in the transaction in the said plea mentioned, and have by their said conduct, and their laches in the assertion of their alleged equities, abandoned the same, and have disintituled themselves to relief thereon. And the plaintiffs further say that before the commencement of this action the said prior mortgage alleged to be made by the plaintiffs to the Bank of Upper Canada was released and discharged by indenture under seal, dated the 14th day of January, 1865, and made between the said Bank of Upper Canada and the said Hartley Dunsford, and the said indenture was duly registered in the proper office where the lands lie on the second day of February thereafter, and the defendants had notice of such alleged prior mortgage being discharged as aforesaid,—wherefore the defendants ought not in equity to set up the said prior mortgage as a defence to this action.

*Demurrer*, on the grounds that the said replication is multifarious, and sets up several inconsistent answers to said plea, and no sufficient answer thereto:—that the allegation that this suit is brought for the sole benefit of the said Hartley Dunsford forms no answer to the said plea: that the said Dunsford holds the said mortgage subject to all the equities of the defendants, and the said plea forms a good defence against him as well as against the plaintiffs:—that it is not alleged that the defendants had express notice of the existence of the said prior mortgage, or any notice otherwise than by its registration:—that the said replication is argument in denial of the allegations in the said plea:—that the execution by the defendants of the mortgage in the said plea mentioned forms no answer to the said plea; and it is not alleged that the said acquiescence took place after knowledge by the defendants of the matters alleged in this plea:—that the subsequent release of the said mortgage alleged by the said replication after the eviction of the defendants, and the other matters alleged in the plea, form no answer to the said plea.

The plaintiffs joined in demurrer, and gave notice of the



following exceptions to the plea:—that the defendants' plea is insufficient, for not stating what representations were made by the plaintiffs, or the nature or tenor thereof, or that they were other than the covenants of the plaintiffs contained in their deed to the defendants of the said land, or that such representations, if any, were made to the defendants, or when they were made, nor but that they, if any, were made after the defendants had paid a part of their purchase money and taken their deed, and were then fully aware that the said lands were encumbered:—that the plea does not sufficiently allege the facts relating to the concealment of the prior mortgage therein mentioned, so as to disclose that the same was a fraudulent concealment thereof, or that the defendants made any inquiries from said plaintiffs as to the existence of such prior mortgage; or that the defendants were ignorant thereof; and that it does not appear that the alleged fraudulent concealment or the alleged false representations would either of them, apart from one or the other, have induced the defendants to purchase the said lands.

*Hector Cameron*, for the demurrer, cited *Brown v. Osborne*, 11 C. P. 500.

*Boyd*, contra, cited *Hendra v. Moffatt*, 19 U. C. R. 447; *Whitehouse v. Roots*, 20 U. C. R. 65, 78; *McDonell et al. v. Thompson*, 16 U. C. R. 154; *Dauphin v. Lesperance*, 14 C. P. 133; *Matthewson et al. v. Henderson et al.* 15 C. P. 90; *Boyes v. McGregor*, 8 C. P. 244; *Gilbert v. Lewis*, 32 L. J. Chy. 347; *Adams v. Nelson*, 22 U. C. R. 199.

DRAPER, C. J., read the judgment of the court, prepared by

HAGARTY, J. The facts may be thus stated:—

Defendants refuse to pay the mortgage, because they say the plaintiffs fraudulently concealed the prior mortgage to the Bank, alleged the title to be clear, and so induced defendants to purchase and pay some money down and to give the mortgage; that the Bank has foreclosed its mortgage and ejected defendants; and that the plaintiffs are insolvent and can pay no damages.

The plaintiffs reply, "When you gave your mortgage, you

had notice of the Bank's prior encumbrance, and entered and remained some time in possession. Before the Bank took any proceedings, we sold your mortgage and all our interest to Dunsford, for value, who bought in good faith, and we have no further interest, but sue merely for Dunsford ; and before this suit was commenced, the Bank released their mortgage to Dunsford, and you had notice of its being discharged, and should not now set it up."

On this latter statement in the replication, which defendants admit to be correct, the foreclosure, if it ever took place, seems clearly opened, and the bank mortgage is discharged by deed between the Bank and Dunsford.

If Dunsford, then, the beneficial plaintiff, has succeeded in removing this prior encumbrance from the lands, he is, of course, in a position to give a good title to defendants, who will then have the estate for which they contracted, on payment of the purchase money now claimed from them.

It is impossible to read the statement in this replication in any light shewing that any title paramount, or interest of any kind, was conveyed by the Bank to Dunsford. It is simply an averment that they *released* and *discharged* their mortgage by deed between him and them. If so, the last words of the replication are perfectly correct, "And the defendants had notice of such alleged prior mortgage being discharged as aforesaid, wherefore the defendants ought not, in equity, to set up the said alleged prior mortgage as a defence to this action."

We quite concur in this view, and think that the defence fails.

Dunsford, who seeks to make defendants pay, has in some way or other removed from the title the only objection urged by defendants, namely, the prior bank mortgage. No reason therefore exists why this action should not lie.

In this view of the pleadings, it seems quite unnecessary to discuss the very grave difficulties which would lie in the way of a court of law administering the equities suggested by the counsel in this argument, and perhaps intended to be raised, but not, we think, actually raised on these pleadings.

Judgment for plaintiffs on demurrer.

MACFARLANE, ADMINISTRATOR OF THOMAS C. PANTON, v.  
RYAN.*Pleading—Accord and satisfaction.*

Declaration by P.'s administrator on a promissory note made by defendant payable to P. Defendant pleaded by way of accord and satisfaction, a certain proposition made to the plaintiff and D. as curators of P.'s estate in Montreal, which was in effect, that one R. would endorse defendant's notes for 17s. 6d. in the £, payable at certain dates, on getting a full discharge; and the defendant averred that the plaintiff and D., as such creditors, "agreed to and accepted the terms of the said proposition," and defendant made and R. endorsed his notes in accordance therewith, and delivered the same to the agent of the said curators in full satisfaction and discharge and as a composition of the causes of action sued for.

*Held*, on demurrer, plea bad, for not averring either that the notes or the agreement were accepted in satisfaction and discharge.

DECLARATION on defendant's note to Thomas C. Panton, the deceased, and on common counts.

*Plea*, that the said Thomas C. Panton, deceased, in his lifetime carried on business as a merchant at the city of Montreal, in that part of the Province of Canada formerly called Lower Canada, and that the cause of action in the said declaration mentioned arose at the said city of Montreal, and that the said Thomas C. Panton died at the said city of Montreal; and the said plaintiff and one C. D. Proctor were duly appointed curators of the estate of the said Thomas C. Panton deceased, and as such had power and authority to deal with all debts and sums of money due and owing or thereafter to become due and owing to the said estate, and to arrange, compound or settle the same in as full and ample a manner as the said Thomas C. Panton, deceased, in his lifetime could and might have done. And the defendant further says, that after the making of the said promises in the said declaration mentioned, and after the accruing of the causes of action therein also mentioned, and before the issue of letters of administration in Upper Canada to the said plaintiff, and before the commencement of this action, the said defendant was indebted to the estate of the said Thomas C. Panton, deceased, in a large sum of money, to-wit, in the sums of money and causes of action in the declaration in this suit mentioned, and to numerous and divers other persons respectively, in



large sums of money, and became and was in bad and embarrassed circumstances, and unable to pay or satisfy the said estate of the said Thomas C. Panton, or the said other creditors of the said defendant, respectively, their debts in full, whereof the plaintiff and the said C. D. Proctor, as such curators as aforesaid, and the said other creditors had notice; and thereupon one Patrick Ryan, at the request and solicitation of the said defendant, made a proposition in writing to one Robert Dennistoun, on behalf of the said creditors of the said defendant, for the purpose of procuring an arrangement or settlement and composition of the said several debts of the said defendant, so then due and owing by the said defendant to the said several creditors as aforesaid, which said proposition was in the words and figures following, that is to say:

“ROBERT DENNISTOUN, ESQ.,

“Sir—In consideration of your undertaking to advise Messrs. Greenshields and Son and Co., and the other creditors of my son James Ryan in Montreal, as set out as follows, that is to say, (naming the different creditors, including T. C. Panton,) to accept a compromise of my son James' indebtedness to them, I hereby guarantee to the said creditors seventeen shillings and six-pence in the pound of their claims on James Ryan, without interest or cost, if they will give time for the payment of the said amount, as follows, that is to say: one-third on the first day of January now next, one-third on the first day of January, one thousand eight hundred and sixty-six, and one-third on the first day of January one thousand eight hundred and sixty-seven. And I hereby agree to endorse James Ryan's notes for the said amounts, payable as above, at the Bank of Montreal here, on getting a free discharge from the said creditors of their claims against the said James Ryan; and I give to the first day of March next to the said creditors to accept this offer.

“Dated the 2nd of February, 1864.

“Witness J. W. BROPHY.

PATRICK RYAN.”

And the said defendant further says, that the said proposition was duly forwarded by the said Robert Dennistoun to the said city of Montreal, to serve on one of the said creditors of the said defendant therein named, and that the same was then and there submitted to each and every of the

therein named creditors, and to the said plaintiff and the said C. D. Proctor, as such curators as aforesaid to the estate of the said Thomas C. Panton, deceased; and the said defendant avers, that each and every of the said creditors of him, the said defendant, in the said proposition named, and the said plaintiff and the said C. D. Proctor as such curators as aforesaid, and as representing the therein named T. C. Panton, in Montreal aforesaid, agreed to and accepted the terms of the said proposition; and thereupon and thereafter the said defendant made, and the said Patrick Ryan endorsed his promissory notes in accordance with and in pursuance of the terms of the said proposition or agreement, and delivered the same to the said Robert Dennistoun as the agent of the said creditors, and of the plaintiff and the said C. D. Proctor as such curators, in full satisfaction and discharge and as a composition of the said debts, and of the causes of action in the said declaration mentioned.

*Demurrer*, on the grounds—1st. The plea should shew that the promissory notes therein mentioned were accepted and received by the plaintiff and the said C. D. Proctor, in full satisfaction and discharge of the causes of action in the declaration mentioned. 2nd. If the matters alleged in said plea are intended to be relied upon as an agreement in substitution of the defendant's liability, it does not appear that such agreement was accepted by the said creditors in satisfaction and discharge of their respective claims against the defendant, nor does it appear that it was mutually agreed by and between the said creditors and the said defendant and the said Patrick Ryan, that the said offer or undertaking should be accepted in satisfaction and discharge as aforesaid, nor that the said agreement was binding and conclusive upon the parties. 3. The acceptance by the said creditors of the said offer or undertaking would form no defence to this action, unless followed by an acceptance and receipt of the notes mentioned in satisfaction. 4. The right of the plaintiff as local administrator in Upper Canada to proceed for the causes of action mentioned being admitted, and it not appearing that the defendant had been or subjected himself to any other jurisdiction, the plaintiff and

the said C. D. Proctor had no authority to interfere in respect of the said causes of action. 5. It does not appear that the said Robert Dennistoun was ever authorized or empowered by the plaintiff and the said C. D. Proctor, or either of them, to accept of the said notes, or to act for them in any other manner in reference to the transactions mentioned, or that he was in fact acting for them, or that he received said notes for them, or that the said notes ever came to their possession or knowledge, or that the delivery of the said notes as alleged was ever notified to them.

*C. S. Patterson*, for the demurrer, cited *Stewart v. Hawson*, 7 C. P. 168.

*Dennistoun*, contra, cited Add. Con. 978; *Brunskill v. Metcalfe*, 2 C. P. 431.

MORRISON, J. read the judgment of the court, prepared by

HAGARTY, J.—If the plea means to set up an accord by giving of defendant's notes endorsed by Patrick Ryan, we think it clearly bad for omitting the essential averment that the notes were accepted in satisfaction. We are not aware of a plea ever being held good merely on the statement of a delivery without an acceptance in satisfaction. Every precedent supports this view. See *Bullen and Leake's Precedents*, 412, and the cases there collected. It is not alone what the defendant but what the plaintiff does, that completes the satisfaction and shews the plaintiff's assent.

But Mr. *Dennistoun* urges that the plea offers a good and binding agreement to the plaintiff, and so is a valid bar: that in fact it is the new agreement, not the performance of it, that is the defence. He relied on *Brunskill v. Metcalfe*, (2 C. P. 431,) on this point.

We do not think that case can be relied on. After issue joined and verdict found in favour of the plea, it was questioned. It in effect set up a composition agreement, and that certain things were to be done, and before reasonable time had elapsed in doing them, defendant being always ready, &c., the plaintiff proceeded with this action. The court said expressly (p. 454) that this plea would be held bad upon special or even upon general demurrer.



The principal case of late years on this subject seems to be *Flockton v. Hall*, (14 Q. B. 380, S. C., In Error, 16 Q. B. 1039.) In the court below, *Coleridge, J.* says, "Where the making of the agreement is itself the thing looked to, the plea must aver that it has been accepted in satisfaction." *Erle, J.* says, "I take the law to be, that an agreement may be accepted in satisfaction of an existing cause of action. If the agreement itself expressed that it, the agreement, was to be accepted in satisfaction, the averment that it was so accepted might be unnecessary."

In Error *Parke, B.* says, "The plea is defective in not shewing that the agreement relied upon was accepted in satisfaction; the only allegation being that it was agreed that certain things should be done, and this action settled, satisfied, discharged and terminated by this arrangement and agreement before mentioned."

Now in the case before us the defence is this—that Patrick Ryan proposed to the creditors to guarantee 17s. 6d. in the £, on defendant's debts, in three annual payments, and he to endorse defendant's notes therefor payable at the times mentioned, on getting a full discharge from creditors.

The plea does not in any way aver that the plaintiffs accepted such agreement of P. Ryan (to which it is not averred that defendant was a party) in satisfaction of the cause of action, but merely that "they agreed to and accepted the terms of the proposition." Unless they accepted the agreement or the performance, one or the other, in satisfaction, it would be what the books call an accord without satisfaction, and no good bar.

If defendant relies on the agreement as in substitution of the contract sued upon, and as giving a new cause of action in lieu thereof, he could have averred that such agreement was accepted in satisfaction and discharge of the former cause of action. Is this sufficiently done by the averment that the plaintiff "agreed to and accepted the terms of the proposition?"

It appears to us that it falls short of what the law requires. Accepting a thing in satisfaction and discharge of a vested cause of action conveys a very well settled and definite idea to the mind. Averring that a proposition was made and

that the plaintiff "agreed to and accepted the terms of said proposition" is very different. We feel reluctant to sanction so wide a departure from a settled form of averring the facts involving so important a legal result.

We think the case of *Stewart v. Hawson* (7 C. P. 168,) strongly in favour of defendant's view.

*Gabriel v. Dresser* (15 C. B. 621,) decided in 1855, is a strong case. The plea was an agreement that defendant should deliver certain timber to be received by the plaintiff in full satisfaction, &c., averment of delivery of part and acceptance by plaintiff in satisfaction, &c., of such part, and tender of residue and refusal to accept. *Maule, J.*, "The meaning of an accord and satisfaction is, that there has been an agreement, and that agreement has been completely performed, and so there has been a total extinguishment of the original cause of action."

*Williams, J.*, cites Com. Dig., Accord, B. 4, "An accord must be executed, otherwise there will be no remedy for a non-performance. \* \* An accord to pay money in satisfaction is not good, if he shews only that he is ready to pay ; but he ought to say that he has paid it. So if he shews only a tender and refusal." We also refer to *Graham v. Gibson*, (4 Ex. 769.)

A late case of *Page v. Meek* (3 B. & S. 259,) at first seems rather in favour of defendant, but on close examination is not so. To an action for £721, the price of rice, defendant pleaded an agreement made with the plaintiff that defendant should pay £681, the whole price except £40, which defendant claimed to be deducted for alleged inferiority of the rice, and that the £40 should be deposited in a third party's hands, to await an inquiry into the quality. Averment of payment of the £681 to plaintiff and the £40 to this third party, and readiness on defendant's part to have the difference adjusted, &c. There was no averment of any acceptance in satisfaction. Demurrer. *Cockburn, C. J.*, said he thought the defence might be pleaded as an accord. It was he said a special plea of payment in a given way. "On the whole this is a plea of payment, because the entire of the money is disposed of according to the will of the

parties." *Wightman* and *Mellor*, J. J., concur in that view.

The averment in the present case that the plaintiff agreed to and accepted the terms of the said proposition, does not in our judgment mean an acceptance of the contract created by the new agreement. We think it means that the plaintiff will accept the things proposed to be done thereunder—in other words, the plaintiff agreed to take Patrick Ryan's guarantee and defendant's notes endorsed by him in payment.

On this construction it would be necessary to aver the performance of the "terms," and then the plea is defective for not shewing the plaintiff's acceptance in satisfaction, as well as P. Ryan's delivery thereof in satisfaction.

The plea therefore is bad, and there must be judgment for the plaintiff.

We also refer to *Buttigieg v. Booker* (9 C. B. 693); *Bayley v. Homan* (3 Bing. N. C. 920).

Judgment for plaintiff on demurrer.

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#### REGINA V. SMITH.

*Practice court—Habeas corpus—C. S. U. C. ch. 10, sec. 9.*

A judge in Practice Court has no authority to grant a rule *nisi* for a *habeas corpus ad subjiciendum*; and where such rule had been issued there returnable in full court, it was discharged on this preliminary objection.

*J. B. Read* obtained a rule in the Practice Court, calling upon the Attorney-General to shew cause why a writ of *Habeas Corpus ad Subjiciendum* should not issue to the keeper of the Common Gaol of the County of Kent, to bring up the body of Andrew Smith, for his discharge from custody. This rule was made returnable in this court.

*Robert A. Harrison*, shewed cause.

He took a preliminary objection, that the Practice Court had no authority to grant such a rule, citing *Sams* and *The Corporation of Toronto*, 9 U. C. R. 181, and subject thereto



the rule was argued upon the objections raised to two warrants upon which the prisoner was committed.

DRAPER, C. J.—The power of a single judge sitting in banc during term in the Practice Court is conferred by sec. 9 of Consol. Stat. U. C. ch. 10, in these words—"Every such judge so sitting apart in banc shall hold the Practice Court, and shall have the same powers and authority as belong to either of such Superior Courts in any way relating to the business of adding or justifying bail, discharging insolvent debtors, administering oaths, hearing and determining matters on motion, and making rules and orders, in causes and business depending in either of the said courts, in the same manner and with the same force, validity and effect as might be done by the court in which such causes or business may respectively be depending."

I think the words of the act do not include such a proceeding as the issuing the rule to shew cause above stated. Till this rule was moved there was no cause or business depending in relation to the prisoner's conviction or commitment, and the foundation for the jurisdiction of the judge sitting in the Practice Court did not exist.

The prisoner was brought before my brother *Hagarty* on a writ of *habeas corpus*, in order to apply for his discharge on the same objections as have been now raised, and was after argument remanded.

I have been made aware of the grounds of that decision, and as at present advised concur in them, though I cannot say I have arrived at a final conclusion (a).

On the preliminary objection this rule must be discharged.

My brother *Hagarty*, not having been able to consider the case with us, takes no part in this judgment.

MORRISON, J., concurred.

Rule discharged.

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(a) The judgment in Chambers is reported in 1 U. C. L. J. 241, N. S.

## GWYNNE V. THE GRAND TRUNK RAILWAY COMPANY.

*Sheriff's fees—C. L. P. A. sec. 271—Construction of.*

A judge's order, under C. L. P. A. sec. 271, fixing the allowance to be made to the sheriff where there has been a seizure under execution but no money levied, is final.

In this case the sheriff rendered his bill, and the plaintiff obtained a summons to reduce it or determine what would be a reasonable charge. *Semble*, that the sheriff should have applied, in order to authorize him to make charges not sanctioned by the tariff.

*Semble*, also, the judge's duty is not to tax the sheriff's account, but to fix a rate of charges for services rendered, leaving it to the Master to determine the amount in case of dispute.

In Hilary Term, *Stephens* obtained a rule calling on the plaintiff to shew cause why the order made by *Morrison, J.*, on the 3rd of February, 1865, should not be rescinded.

The order was made under the 271st section of the Consol. Stat. U. C. ch. 22, C. L. P. A. which, among other things, provides that if the real or personal estate of a defendant be seized or advertised on an execution, but not sold, from any cause, and no money be actually levied, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs.

The sheriff in this case received a *fi. fa.* against goods, upon which proceedings were stayed, and there was neither sale nor advertisement. He rendered a bill of his charges, without having obtained any rule of court or judge's order allowing any of those for which no special fee is assigned in the tariff.

Upon this the plaintiff obtained a summons, to reduce, or determine the amount which should be deemed a reasonable charge, on which the above order was made.

*Gwynne, Q.C.*, shewed cause.

DRAPER, C. J.—Regularly, as it seems to me, the sheriff should have applied, in order to obtain the authority to claim fees or charges not sanctioned by the existing tariff. However, both parties appeared before my brother *Morrison*,

who made the order above mentioned, fixing what, upon the affidavits before him, he deemed "a reasonable charge."

The sheriff moves to rescind the order, on the ground that it does not allow to him as many days possession money as he claims to be entitled to, and that the sum allowed for each day's keeping possession is too small.

I rather incline to the opinion that the more regular course would have been to have fixed by the judge's order the daily sum which should be allowed for possession money, and if the number of days was in dispute to have referred that point to the Master, who would then have a complete tariff to enable him to tax the sheriff's whole bill. No objection is however urged except those above stated.

In my opinion the order of the judge in vacation as to what is to be deemed "a reasonable charge" for services not provided in any tariff, is as final as a rule of court on the same subject would be in term; and I arrive at this conclusion, among other reasons, because I think it was not meant that either the court or a judge should tax the sheriff's account, and determine what services the sheriff had rendered, but that they should supply the foundation for ascertaining what he is entitled to, by fixing a rate of charge for services rendered and for which no rule of court or tariff has made any provision.

I think therefore the rule should be discharged, but without costs, as the point has not been previously raised.

My brother *Hagarty*, having considered this case with us, concurs in the judgment.

MORRISON, J., concurred.

Rule discharged.



## HAZLITT V. HALL, (SHERIFF.)

*Fi. fa. lands—Inception of execution.*

Lands were advertised under F's execution in a local paper on the 10th September, 1863, while the writ was current, but not in the official Gazette until the 19th, four days after it had expired.

*Held*, that there had been no sufficient commencement of the execution, to enable it to be completed by sale and conveyance of the lands under it.

ACTION for a false return to an execution at the plaintiff's suit, against the lands of one Shanahan, alleging that though the defendant had levied on the land he returned No Lands, &c.

*Plea*, traversing the levy.

At the trial, at the last Peterborough Assizes, before Adam Wilson, J., the following statement of facts was agreed on, and a verdict was entered for defendant, with leave to the plaintiff to move to enter it for him, if the court should think him entitled to recover on the following

## STATEMENT OF FACTS:

James Ferrier the younger, and George Davis Ferrier, duly recovered in the Court of Common Pleas a judgment for the sum of £157 0d. 6d. against the said Shanahan.

A *fi. fa.* against goods was duly issued thereon and returned.

Thereafter, on the 16th of September, 1860, a *fi. fa.* lands was issued, founded upon said judgment, to levy the full amount, and duly endorsed to levy the same and costs of writs, &c., directed to the defendant.

Said writ was on the 28th of September, 1861, placed in the hands of the defendant for execution as such sheriff.

Said *fi. fa.* was duly renewed on the 15th of September, 1862.

Lands of Shanahan were advertised for sale in the usual manner in a local paper, (*Peterborough Examiner*) for three months, the first of such advertisements appearing in the issue of 10th September, 1863.)

A similar advertisement was inserted in the *Canada Gazette* for six weeks, the first of such insertions being on the 19th of September, 1863.

Between the time of sending the advertisement to the *Gazette* by the sheriff and its appearance in the *Gazette*, there was no delay, the advertisement having been mailed

after its appearance in the local paper and appearing in the first issue after its receipt at the *Gazette* office.

Lands were, in pursuance of such advertisements, offered for sale by the defendant on the 15th of December, 1863.

On the 11th of January, 1864, defendant returned said *fi. fa.* lands on hand for want of buyers.

On the 12th of January, 1864, a *ven. ex.* was issued, and defendant directed to make the whole debt, by endorsement thereon in the usual manner.

On the 13th of January, 1864, the *ven. ex.* was placed in the hands of the sheriff for execution. Lands were advertised for sale pursuant to the *ven. ex.* for the 21st of February, 1864, and the sale was from time to time adjourned until the 7th of March, 1865.

On the 7th of March, 1865, lands were sold under said writs and advertisements to one McFarlane, a partner of Ferrier & Co., for £40, which moneys were applied by defendant on said writ.

The plaintiff proceeded regularly to issue a *fi. fa.* lands, which was endorsed as in said declaration mentioned.

Said *fi. fa.* was duly delivered to the defendant for execution on the 18th of August, 1863, and was duly renewed on the 16th of August, 1864, and remained in the hands of the defendant until after the sale mentioned in the thirteenth paragraph of this statement.

After said sale, and before the commencement of this action, the said defendant returned the said writ in the declaration mentioned "No Lands."

No advertisements other than those above mentioned were ever inserted in either a local paper or the *Canada Gazette*, in reference to either of the said *fi. fas.* against lands.

At the sale the sheriff said he sold under all the writs in his hands.

Before the sale the plaintiff by his attorney openly claimed the proceeds of the sale, on the ground that Ferrier's writ was spent at the time of the seizure.

No act of seizure was done by the said sheriff other than as aforesaid.

*Hector Cameron* obtained a rule *nisi* to enter a verdict for the plaintiff, on the leave reserved, citing *Bank of Montreal v. Munro*, 23 U. C. R. 414; *Rowe v. Jarvis*, 13 C. P. 497; *Reynolds v. Streeter*, 10 U. C. L. J. 186; C. L. P. A. secs. 267, 268.

*James Dennistoun* shewed cause, and cited *Doe Tiffany*

v. Miller, 6 U. C. R. 426, S. C. 10 U. C. R. 65; Hall v. Goslee et al. 15 C. P. 101; Bl. Com. vol. i, p. 89.

DRAPER, C. J., read the judgment of the court, prepared by

HAGARTY, J.—The question is this:—All that was done by the sheriff on Ferrier's writ while it was current, was to advertise in the local paper. The advertisement in the official *Gazette* did not appear till four days after the writ was spent.

The plaintiff contends that there was no valid or sufficient inception of Ferrier's writ before it was spent, and, as his writ was regularly in the sheriff's hands during all the time of all the advertisements down to the time of sale, that the lands were in fact, seized and sold on his writ, and not on Ferrier's.

It is conceded, on the authorities cited, that a seizure is under all writs, according to their priority, which the sheriff has then in his hands to be executed, however he may profess to seize.—Hall v. Goslee, 15 C. P. 101; Rowe v. Jarvis, 13 C. P. 495.

The question is therefore narrowed down to whether there was or was not a sufficient commencement of Ferrier's execution, by advertisement in the local papers only.

We think this point is decided against the defendant, as far as this court is concerned, by our judgment in the Bank of Montreal v. Munro, (23 U. C. R. 418). It is there said, "Great obscurity rested on the question as to what was an inception of an execution against land until the passing of the Common Law Procedure Act." After citing sec. 268: "The advertisement in the official *Gazette* of any land for sale under a writ of execution, during the currency of the writ," &c., &c., "shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable," the court says, "We must look at the position of the plaintiff's writ at the time of the commencement of its execution, namely, the publication in the official *Gazette*," &c., &c.



We adhere to that view, and consider that it governs this case.

We are not aware that prior to the Common Law Procedure Act, an advertisement in a local paper was ever, by itself, held to be a sufficient inception or laying on of an execution against land.

We were told in the argument that since the case last cited the Court of Common Pleas has adopted a different opinion, in *Hall v. Goslee*, (15 C. P. 101). We have examined that case and do not see how it can be so construed.

The point is not expressly noticed in the judgment, and the facts do not seem to raise it.

The judgment states that the plaintiff (in whose favor it was) had his execution in the sheriff's hands current to the 13th of August, 1863; that an advertisement under writs of the Commercial Bank was published in the local papers on the 17th of June, 1863, and in the official *Gazette* on the 25th of July, 1863. The Commercial Bank executions seem to have expired on the 23rd of July, two days before the *Gazette* publication.

We see nothing whatever in that judgment indicating that the Court of Common Pleas views the law differently; and we should in any event, according to our settled practice, have followed our decision in the earlier case of *The Bank of Montreal v. Munro*, until reversed by a Court of Error.

We feel unwilling to abandon what we regard as the clear light thrown on this long disputed question by the Common Law Procedure Act, for the hazy state of the law in which the learned judges who decided such cases as *Doe Miller v. Tiffany* had to search after the true rule of decision.

We see nothing in the objection that the action charges a levy on the plaintiff's writ.

We think the rule should be absolute to enter a verdict for plaintiff on the leave reserved.

Rule absolute.

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## ROBINSON V. WADDELL, SHERIFF.

*Executions—Priority—False return to fi. fa.—Necessity for proof of judgment.*

An *al. fi. fa.* at the suit of B. was received by the then Sheriff, F., on the 26th September, 1861, and having been renewed was returned on the 7th of September, 1863, goods on hand 1s. and *nulla bona* as to the residue. This return was made at the request of B.'s attorney, although there had been no seizure, as the attorney doubted whether the *fi. fa.* could be renewed a second time. On the 22nd a *ven. ex.* and *fi. fa.* residue was delivered to the same sheriff, and remained with him until his removal from office on the 10th of March, 1864, when defendant was appointed, but no transfer of the writ to him by indenture was made until the 9th of May following. On the 15th of April, 1864, the plaintiff's *fi. fa.* came in, and soon after the debtor's interest in certain crops was sold, and the proceeds paid over by defendant to B., who indemnified him.

The plaintiff thereupon sued the sheriff for falsely returning his writ *nulla bona*, contending (among other things) that the return to B.'s *al. fi. fa.* being false to B.'s knowledge and procured by him, the *ven. ex.* and *fi. fa.* founded upon it was void. There was no evidence of any fraud; and it appeared that B.'s writ had been placed and continued in the sheriff's hands for execution. The reason assigned for the long delay in acting upon it was that the debtor's goods had been sold under execution in 1861, and were supposed to be exhausted.

*Held*, (affirming the judgment of the County Court,) that B.'s writ had priority, for the return, though not true in fact, bound the late sheriff and the bank, and could not prejudice the plaintiff.

*Held*, also, that defendant was not bound to prove the judgment on which B.'s writ issued, and that his being indemnified by B. could make no difference in this respect.

APPEAL from the county court of the United Counties of Northumberland and Durham.

This was an action brought against the defendant, as sheriff, for a false return to a writ of *fi. fa.* The declaration contained two counts:—1st. Alleging the levying of money by defendant to the amount endorsed on the plaintiff's writ of *fi. fa.* against the goods of one Ashford, and falsely returning *nulla bona*. 2nd. For not levying when defendant might and could have levied the amount endorsed, &c., and returning *nulla bona*.

*Pleas*.—To first count, that defendant did not by virtue of the plaintiff's writ levy the moneys endorsed, &c.; and to the second count, no goods of Ashford's whereof defendant could have levied the money, &c., endorsed on the plaintiff's writ.

The question was whether a writ of *ven. ex.* and *fi. fa.* residue, at the suit of the Bank of Upper Canada, placed in

the hands of a former sheriff, (Fortune,) on the 22nd of September, 1863, and who had been removed from his office, and which writ passed into the hands of the defendant, the succeeding sheriff, had priority of a writ of *fi. fa.* at the suit of the plaintiff, and received by defendant since his appointment.

It appeared that an *alias fi. fa.* goods, at the suit of the Bank of Upper Canada against Ashford, issued on the 9th of September, 1861, which was received by sheriff Fortune on the 26th of September, 1861, renewed on the 8th of September, 1862, and returned by the late sheriff on the 7th of September, 1863, goods on hand 1s., and *nulla bona* as to the residue: that on the 18th of September, 1863, founded on that writ and return, a *ven. ex.* and *fi. fa.* residue was sued out and delivered to sheriff Fortune on the 22nd of September, 1863. This latter writ remained in his hands until his removal from office, on the 10th of March, 1864, on which day the defendant received his appointment of Sheriff, and obtained possession of the office of his predecessor, and access to all his books, writs, papers, &c.; but no formal transfer of the writs by indenture took place until the 9th of May, 1864: that on the 15th of April, 1864, the plaintiff's *fi. fa.* against Ashford was placed in defendant's hands, and soon after the interest of Ashford in certain growing crops was seized and subsequently sold.

The amount realized was claimed by the Bank by right of priority. The plaintiff also claimed the amount, contending that the bank's writ was void, being founded upon a false return, and also that the *alias fi. fa.* being spent, it and the return of goods on hand, &c., were also void: that the renewed *fi. fa.* and *ven. ex.* and *fi. fa.* residue having remained so long unexecuted, must be deemed fraudulent and void as against the plaintiff. The defendant applied the money made to the bank's writ, and returned *nulla bona* to the plaintiff's *fi. fa.*

On the trial, Culver, the defendant's bailiff, was called. He testified to having warrants under both writs when he seized the crops, and that he sold under both warrants. The defendant was called by the plaintiff and examined, and



testified that he paid over the money made to the Bank of Upper Canada: that the writs were in the late sheriff's hands upon his, defendant's, appointment: that he went into the same office and had access to the writs and books of the late sheriff as soon as he was appointed, on the 10th of March, 1864; that the bank writ was transferred by indenture from the late sheriff on the 9th of May, 1864.

Arthur Hawes, the late sheriff's deputy, was also called. He testified that as deputy sheriff he received the writ of *ven. ex.* and *fi. fa.* residue on the 22nd of September, 1863, and that he received it for execution in the regular way; that there was no stay to the former sheriff or defendant, and no instructions not to proceed. This witness also proved that he made the return to the *alias fi. fa.* at the request of the clerk of the attorney of the bank, although no seizure had been made, as the clerk knew: and that the clerk stated he wished it to be done because there was a question whether the writ could be renewed a second time: that Ashford's goods had been sold under other executions and exhausted, on the 8th of May, 1861, and he knew of no other goods. Regularly, the witness said, it should have been returned *nulla bona*; and that the reason the transfer (of the writ to defendant) had not been made before the 9th of May, 1864, was that he, witness, had not reached it in the schedule. This witness, upon the removal of the late sheriff, entered the employment of defendant as a clerk.

It was objected that defendant should have proved the judgment on which the *ven. ex.* was founded.

Upon the trial of the cause the learned judge directed the jury that the writ of the Bank of Upper Canada as against the *fi. fa.* of the plaintiff was void, and that the verdict should be for the plaintiff.

A verdict being rendered in pursuance of that direction, in the following term the defendant obtained a rule *nisi* for a new trial, on the ground of misdirection of the learned judge in so charging the jury; and, after argument, the learned judge made the rule absolute for a new trial without costs. Against that decision this appeal was brought.

*J. D. Armour*, for the appellant, cited *Gardiner v. Juson*, 2 Appeal Rep. U. C. 188; *Robertson v. Fortune*, 14 C. P. 444; *McKee v. Woodruff*, 13 C. P. 583; *Oviat v. Vyner*, 1 Salk. 318; *Watson on Sheriffs*, 21; *Sewell on Sheriffs*, 20; *Tidd. Prac.* 1059; 20 Geo. II., ch. 37.

*C. S. Patterson* contra, cited *Brand v. Mears*, 3 T. R. 388; *Cowperthwaite v. Owen*, Ib. 657; *Heenan v. Evans*, 3 M. & G. 398; *Doe Emmett v. Thorn*, 1 M. & S. 425.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the judgment of the court below should be affirmed and this appeal dismissed.

Upon the trial no evidence of fraud was given, or any evidence to shew that the writ of the Bank of Upper Canada was not placed in the late sheriff's hands in the usual and regular way for execution, or that it remained with the defendant or his predecessor for any purpose but that of retaining or obtaining priority in the event of Ashford having or acquiring any chattel property liable to seizure—a view which is in some degree supported when we consider the character of the property seized, namely, an interest of Ashford in growing crops; while the fact that the goods of Ashford had been sold and exhausted to satisfy other writs placed in the late sheriff's hands prior to the writ of the Bank of Upper Canada, affords in itself a reasonable excuse for the late sheriff not proceeding on the writ. If the writ of the bank was merely kept in the sheriff's office collusively, such as for the purpose of protecting Ashford's property from being sold by other creditors, that would have been a question for the jury.

We see no ground for holding, as contended for by the plaintiff, that the bank's *alias fi. fa.* was spent, or that the writ of *ven. ex.* and *fi. fa.* residue founded on the return of the *fi. fa.* was void. As to the *alias fi. fa.*, it appears to have been renewed within the year; and as to the return of goods on hand, the evidence shews that it occurred through the bank's solicitor doubting whether the *fi. fa.* could be further renewed under the 249th section of the C. L. P. Act, which point has been set at rest by the 27

Vic., ch. 13. The return, although not true in fact, would be binding on the late sheriff and the bank, and would enure *pro tanto* to the appellant's benefit, and in the absence of fraud on the part of the bank the appellant could sustain no injury. The return of *nulla bona* as to the residue not being impeached, the *fi. fa.* residue was good, and having priority was entitled to be first satisfied out of the proceeds of the sale.

As to the objection that the defendant should have proved the judgment upon which the writ of the Bank of Upper Canada issued, we see no ground for such a contention, and can find no authority in support of it. This case is not within the principle laid down in *Martyn v. Podger*, (5 Burr. 2631,) and subsequent cases. This action is brought to recover damages for an alleged breach of duty by defendant in returning the plaintiff's *fi. fa. nulla bona*, to which defendant replies that he did not seize any goods the proceeds of which were applicable to the plaintiff's writ, and in proof thereof he shews that the goods seized of the execution debtor were exhausted in satisfaction of a prior writ in his hands. The fact of the defendant being indemnified makes, in our judgment, no difference in a case like this. We can only look to the parties in the record, and whether indemnified or not it was the duty of the sheriff to do as he did; and although indemnified a sheriff may nevertheless act *bonâ fide*.

Appeal dismissed, with costs.

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# MEMORANDA.

During this term the following gentlemen were called to the bar :—

JAMES HUTCHISON ESTEN,  
JOHN CASSIE HATTON,  
GEORGE YOUNG SMITH,  
SUTHERLAND MALCOLMSON,  
WILLIAM SIDNEY SMITH,  
ARTHUR STURGIS HARDY,  
CHRISTOPHER SWITZER CORRIGAN,  
JOHN MCINTYRE,  
WINTRINGHAM CLIFTON LOSCOMBE.

TRINITY TERM, 29 VICTORIA, 1865.

(August 28th to September 9th).

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*Present :*

THE HONORABLE WILLIAM HENRY DRAPER, C. B. C. J. (a)

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

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DICKSON V. CRABB.

*Action against J. P.—C. S. C. ch. 103, sec. 67—C. S. U. C. ch. 126.*

Defendant, a Justice of the Peace, issued his warrant, under Consol. Stat. C. ch. 103, sec. 67, to commit the plaintiff for thirty days for non-payment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment and conveying the plaintiff to gaol should be sooner paid; but he omitted to state in the warrant the amount of the costs of the distress and commitment. The plaintiff having been committed on this warrant sued defendant for false imprisonment.

*Held*, that though it was the duty of the Justice to ascertain and state such amount, yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not shew either a want or an excess of jurisdiction, but rather an irregular exercise of it; and that defendant therefore was not liable in trespass.

*Held*, also, that the determination as to these costs was clearly a judicial and not merely a ministerial act.

TRESPASS and false imprisonment against the defendant  
“acting as one of Her Majesty's Justices of the Peace.”

*Plea*, not guilty by statute.

The trial took place at Goderich, in March, 1865, before  
*John Wilson, J.*

The plaintiff put in evidence a warrant signed by defendant, dated 20th May, 1864, which recited that Laughlan McDonald and seven other persons were on the 21st of November, 1863, convicted before two justices for malicious trespass on the plaintiff's land, and were for that offence each fined \$2, and adjudged to pay \$20 costs; and it was also adjudged that Laughlan McDonald should pay to the plaintiff

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(a) The Chief Justice was absent on the last two days of this term, owing to the loss of a near relative.

\$200 for damages; and if these several sums were not paid before the 1st of December, 1863, that they should be imprisoned in the County Jail of Huron and Bruce for six days at hard labour, unless, &c.:—that these parties so convicted appealed to the General Quarter Sessions of the Peace at Goderich, which court on the 8th of March, 1864, ordered that the conviction should be quashed, and that the respondent (the now plaintiff) should pay the appellants £6 11s. 9d., costs of their appeal, to be paid to the Clerk of the Peace within twenty days, to be by him paid over to the appellants: that the clerk of the peace on the 7th of April, 1864, certified these costs had not been paid: that on the 7th of April, 1864, the defendant issued a warrant to the proper officers to levy that sum by distress and sale of the plaintiff's goods, but no sufficient distress was found;—and then the present warrant was issued, commanding the constables to take the plaintiff, and deliver him to the keeper of the common gaol at Goderich, and commanding the keeper to keep the plaintiff imprisoned for thirty days, unless the said sum, and all costs and charges of the distress and of the commitment and conveying the plaintiff to gaol, should be sooner paid.

Upon this warrant the plaintiff was committed to gaol on the 21st of May, and discharged upon *Habeas Corpus* on the 8th of June, 1864.

It was objected that on this evidence the action should have been case, and that trespass would not lie; and the learned judge being of that opinion nonsuited the plaintiff, with leave to move.

In Easter Term *K. McKenzie*, Q.C., obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside. He cited *Linford v. Fitzroy*, 13 Q. B. 240; *Leary v. Patrick*, 15 Q. B. 266.

In this term *S. Richards*, Q.C., shewed cause, citing *Skingley v. Surridge*, 11 M. & W. 503; *George Goff's case*, 3 M. & S. 203; *Barton v. Bricknell*, 13 Q. B. 396; *Connors v. Darling*, 23 U. C. R. 541; *Bott v. Ackroyd*, 5 Jur. N. S. 1053.



DRAPER, C. J. delivered the judgment of the court.

The order recited in this warrant as having been made by the Court of Quarter Sessions, that the plaintiff should pay costs, appears to be in conformity with Consol. Stat. C. ch. 103, sec. 66. The 67th section of that act provides that if the same be not paid within the time limited, the Clerk of the Peace, on application of the party entitled, shall grant to such party a certificate that such costs have not been paid, and upon production of such certificate to any Justice of the Peace for the same territorial division, he may enforce the payment by warrant of distress, and in default of distress may commit the party against whom such warrant has issued for any time not exceeding two months, unless the amount of such costs and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such justice think fit so to order, (the amount thereof being ascertained and stated in such commitment) be sooner paid.

The defendant relies on the Consol. Stat. U. C. ch. 126, sec. 1, which enacts that every action brought against a Justice of the Peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case. The plaintiff contends this is an act done under a warrant issued by the defendant, in a matter in which by law he had not jurisdiction, or (and this we presume was really relied upon) in which he exceeded his jurisdiction, and therefore that trespass will lie.

The objection taken to the warrant is, that neither the costs and charges of the distress, nor of the commitment, nor of the conveyance of the plaintiff to gaol were stated in the warrant; and it was insisted that it was the duty of the justice to ascertain all these, and to fix the amount upon payment of which, together with the previously ascertained sum, the plaintiff was to be discharged.

We agree so far in the argument for the plaintiff, and think it not improbable that this omission on the part of the justice led to the plaintiff's discharge, but we are unable to arrive at the conclusion that it establishes either that the justice had no jurisdiction or exceeded his jurisdiction.

As to the first, the Statute of Canada above cited expressly gives jurisdiction to issue a warrant, and because the warrant is not framed throughout in accordance with that act we do not conclude that there is an excess of jurisdiction.

The very argument for the plaintiff is that the justice had authority and jurisdiction over the subject matter, but exercised it defectively: that it was his duty in issuing this warrant to have determined the amount of costs attending the ineffectual attempt at distress, of the charge for commitment, and the distance the plaintiff would have to be conveyed to gaol, and the proper charge allowable for that service. This involved inquiry into facts, the determination of those facts, and the application of the law which fixes the costs thereupon.

We think the case therefore shews an irregular exercise of jurisdiction rather than an excess of it, and that we should not sustain the argument, that the law having only conferred jurisdiction to be exercised in a particular formal manner, the omission of some part of what is prescribed makes the whole act an excess of jurisdiction; for the justice had power to commit until everything stated in his warrant was done which the warrant made a condition precedent to the plaintiff's discharge within the thirty days. We do not hold that the irregular form of a warrant, when the justice has jurisdiction over every subject matter to which the warrant relates, should be construed to be an excess of jurisdiction, so as to deprive him of the protection of the act.

Nor do we concur in the argument that the defendant was acting ministerially only, for the determination of these questions as to costs was we think clearly an act of adjudication. The case of *Linford v. Fitzroy* (13 Q. B. 240) cited by Mr. McKenzie, was argued before the passing of the Imperial Statute, 11 & 12 Vic. ch. 44, on which our Stat. of U. C. ch. 126, above referred to, was framed.

This case appears to us to come within the spirit and meaning of that act. If the defendant had acted maliciously and without reasonable or probable cause he would be liable in an action on the case, but he is not a trespasser, since that act, if he had jurisdiction and has not exceeded it.

The case of *Leary v. Patrick* (15 Q. B. 266) is the most strongly in favour of Mr. McKenzie's argument, but it is quite distinguishable. There the plaintiff was arrested on a warrant for a penalty and 12s. costs. It appeared in evidence there never had been any adjudication for costs, and the court, without entering into the question whether costs were recoverable or not, held the plaintiff was unlawfully arrested for costs which had never been adjudged against him.

We think the rule should be discharged.

Rule discharged.

### MOFFAT V. BARNARD.

*Action against J. P.—Conviction under C. S. C. ch. 92, sec. 18—Right to commit without distress—C. S. C. ch. 103, secs. 57, 59, 62.*  
C. S. U. C. ch. 126.

Defendant, a Justice of the Peace, convicted the plaintiff under Consol. Stat. C. ch. 92, sec. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to defendant, and a boy living with his parents and having no property.

*Held*, that the action would not lie, for defendant was authorized by Consol. Stat. C. ch. 103, sec. 59, to commit in the first instance, that statute applying to this conviction; and the warrant was sufficient, as it followed the form given by the Act, which contains no recital of the ground for not first issuing a distress.

*Quere*, whether defendant would have been liable if he had not proved, as he did, the facts which justified him in dispensing with distress.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount. *Held*, following *Dickson v. Crabb*, ante, page 494, that this would not make defendant a trespasser.

TRESPASS, for assaulting the plaintiff and giving him in charge of a constable, and causing him to be imprisoned in gaol. *Plea*, not guilty, by statute.

At the trial, at Cobourg, before *Adam Wilson, J.*, at the last spring assizes, the gaoler was called, who proved that the plaintiff was brought to gaol on the 17th of September, 1863, under a warrant signed by defendant, and remained in gaol until the 26th of September, when he was discharged on *Habeas Corpus*, by an order of Mr. Justice John Wilson.



The warrant was addressed, as usual, to all constables and the keeper of the gaol, and recited that the plaintiff and another was convicted before the defendant, one of her Majesty's Justices of the Peace, &c., for that they, the said Charles Moffat and W. H., did on Friday night then last past, enter the Baptist Church during divine service, in South Monaghan, and disturb the solemnity of said meeting, by talking and making a noise, and acting in a disorderly manner ; and it was thereby adjudged that the said Charles Moffat and W. H. for their offence should forfeit and pay the sum of five dollars each, and should pay to Benjamin Halsted the sum of ten dollars, for his costs in that behalf ; and it was thereby further adjudged, that if the said several sums should not be paid before the 15th inst., the said Charles Moffat and W. H. should be imprisoned in the common gaol of the said United Counties at Cobourg, for the space of 21 days, unless the said several sums and costs, and charges of conveying the said Charles Moffat and W. H. to the said common gaol, be sooner paid ; and that the time in and by said convictions appointed for payment of the said several sums had elapsed, but Charles Moffat and W. H. had not paid the same or any part thereof, but therein made default. "These are therefore to command you, the said constables, &c., to take the said Charles Moffat and W. H., and them safely convey to the common gaol at Cobourg aforesaid, and there to deliver them to the keeper thereof with this precept. And I do hereby command you, the said keeper, &c., to receive the said Charles Moffat and W. H. into your custody in the said common gaol, there to imprison them for the space of 21 days, unless the said several sums, and costs and charges of conveying them to the said common gaol, amounting to the further sum of                      dollars, shall be sooner paid," &c.

A rule of this court of Michaelmas Term, 27 Vic., was also put in, quashing the conviction made by the defendant upon which he issued the warrant.

At the close of the plaintiff's case it was objected, on the part of the defendant, that trespass would not lie, as the defendant had jurisdiction over the offence as a justice of the peace, and that he did not exceed this jurisdiction, although

he might have proceeded irregularly. The plaintiff contended that there was an excess of jurisdiction by the defendant, in his having issued a warrant of commitment in the first instance, he having no authority under Consol. Stat. C. ch. 92, sec. 18, to issue a warrant to arrest until after he had issued a distress warrant and no distress found; and that that enactment was not affected by Consol. Stat. C. ch. 103, sec. 59, and that in any event defendant did not profess to act under it. The plaintiff also contended that defendant exceeded his jurisdiction in directing the gaoler to detain for the charges of conveying defendant to gaol, the amount not being mentioned in the warrant.

The learned judge was of opinion that the defendant had jurisdiction to issue the warrant to commit, and that without first issuing a distress warrant, and also that it was not an excess of jurisdiction in the defendant to include the costs of conveying to gaol in the warrant, although as a fact he did not do so; but on this point, not being clear as to the effect of the case of *Leary v. Patrick*, 15 Q. B. 266, he ruled in favour of the plaintiff. Several other objections were taken at the trial and in the rule nisi to the right of the plaintiff to recover, which it is not necessary to advert to.

Leave was reserved to defendant to move to enter a nonsuit, on the grounds taken, and the plaintiff had a verdict for \$10 damages.

*J. D. Armour*, pursuant to leave, obtained a rule nisi to enter a nonsuit on several grounds, the first of which was that trespass was not maintainable against the defendant, the act complained of being an act done by him in the execution of his duty as a justice of a peace, with respect to a matter within his jurisdiction as such justice, and that he did not exceed it.

*Nanton* shewed cause, citing *Leary, v. Patrick*, 15 Q. B. 266; *Barton v. Bricknell*, 13 Q. B. 393; *Massey v. Johnson*, 12 East 68; *Hardy v. Ryle*, 9 B. & C. 603.

*Armour* supported his rule, citing *Croukhite v. Sommer-ville*, 3 U. C. R. 129; *In re Allison*, 10 Ex. 561; *Regina v. Shaw*, 23 U. C. R. 616; *Haacke v. Adamson*, 14 C. P. 201.

MORRISON J.—Upon the first objection, that trespass will not lie, I am of opinion that our judgment should be in favor of the defendant. The cause of action was an act done by the defendant as a justice of the peace, with respect to a matter within his jurisdiction, and he is entitled to the protection of our statute Consol. Stat. U. C. ch. 126, sec. 1.

The plaintiff was charged before the defendant with an offence within the provisions of the 18th section of ch. 92, Consol. Stat. C. The defendant had jurisdiction under that section to impose the fine and costs on the plaintiff, and in default of payment within the period specified for payment, to issue a warrant to levy the fine and costs; and if no sufficient distress could be found to commit the plaintiff to gaol for a term not exceeding a month, unless the fine and costs were sooner paid. In this case the defendant did not issue a warrant to levy the fine and costs, but without first doing so he issued a warrant to commit the plaintiff, and the plaintiff contends that such a proceeding was an excess of jurisdiction. I cannot take that view of it.

The act respecting the duties of justices out of sessions, in relation to summary convictions, ch. 103, Con. Stat. C., secs. 57 and 59, very clearly gives the authority and jurisdiction to the convicting magistrate to commit to gaol without first issuing a warrant to levy the fine and costs; and I think the statute applies to a conviction under the 18th section of chapter 92, and that the defendant was authorized to commit the plaintiff by a warrant in the form used by the defendant in this case.

The 57th section enacts that when a conviction adjudges a pecuniary penalty, and by the statute authorizing such conviction the penalty is to be levied upon the goods of the defendant by distress, &c., the justice making such conviction may issue his warrant of distress, according to a form in the schedule of the act, &c.; and the 59th section enacts that “Whenever it appears to any Justice of the Peace to whom application is made for any warrant of distress as aforesaid” (*i. e.* in the preceding clause, 57) “that the issuing thereof would be ruinous to the defendant and his family, or whenever it appears to the said justice, by the confession of the



defendant or otherwise, that he hath no goods and chattels &c., whereon to levy such distress, then such justice, if he deems it fit "instead of issuing a warrant of distress may, (O 1, 2,)" (referring to the form of warrant to commit) "commit the defendant to the common gaol," &c., "there to be imprisoned with or without hard labour for the time and in the manner the defendant could by law be committed in case such warrant of distress had issued, and no goods or chattels had been found whereon to levy," &c.

Upon a reference to the form of the warrant in the schedule to the act, no recital or reference is made, that it appeared to the justice that the party had no goods, and the warrant issued by the defendant corresponds with the form authorized by the statute; so that if it did appear to the defendant that it was useless to issue a warrant of distress in the first instance, the defendant was justified in issuing the warrant to commit as he did.

In the present case the defendant no doubt was satisfied that the plaintiff had no goods, as it appeared in evidence at the trial that the plaintiff was well known to the defendant, that he was a young lad living with his parents, and that he had no property.

I am not prepared to say, and I wish to guard myself from holding, that if a justice of the peace should issue a warrant to commit in the first instance, upon a charge such as was alleged against this plaintiff, without it appearing to him that the person convicted had no goods, or taking some means to ascertain the fact, that he would not be liable in trespass for exceeding his jurisdiction, and that it would not be incumbent on him in an action like this to give some evidence to that effect—the statute under which he convicts expressly declaring that he shall first issue a distress warrant, and the statute ch. 103 only dispensing with that proceeding under certain circumstances.

It would have been better and more satisfactory, perhaps, if the form given by the statute had provided for reciting the fact, so as to shew that the justice professed to act under that provision of the act to which the form referred, but, as *Pollock, C. B.*, said in *In re Allison*, (10 Ex. 567,) "The

statute gives a form to be adopted by magistrates, and they are not called upon to reason upon the matter."

Then as to the objection to the direction in the warrant to detain the plaintiff until payment of the charges of conveying him to gaol. There can be no doubt, and it was not denied, that the defendant had authority so to do, under the 62nd section of chapter 103, and the form of the warrant referred to in the 59th section expressly refers to these charges; but it is contended that as the amount of these charges was not inserted in the warrant, the blank for the amount not being filled up, there was an excess of jurisdiction. Leaving the amount blank was evidently an omission. A like objection was taken in the case of *Dickson v. Crabb*, in this court, in which judgment was delivered to-day. There the objection taken was, that neither the costs and charges of the distress nor of the commitment, nor of the conveyance of the party to gaol, were stated in the warrant; and, as said by the learned Chief Justice, it only shews an irregular exercise of jurisdiction rather than an excess of it. Here the defendant apparently had determined the amount of the charge, but omitted to insert it in the warrant, leaving the amount "\_\_\_\_\_ dollars." In *Dickson v. Crabb* we have decided that the case is within the spirit and meaning of the statute, chap. 126, sec. 1, and that trespass will not lie; and that decision disposes of the objection in this case.

HAGARTY, J., concurred.

DRAPER, C. J., not having been present at the argument, took no part in the judgment.

Rule absolute for nonsuit.

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## CRAIG V. THE GREAT WESTERN RAILWAY COMPANY.

*R. W. ticket, "good for twenty days"—Right to stop at intermediate stations.*

The plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked "good only for twenty days from date." He took defendants' afternoon accommodation train at the Suspension Bridge, which ran only as far as London, but he left it at St. Catharines, an intermediate station, and defendants refused to let him go on from thence by the night express.

*Held*, that they were justified in so doing: that defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and if that train did not go the whole distance, to be conveyed the residue in some other train,—the whole journey to be completed within twenty days: but that it did not give a right to stop at any or every intermediate station.

*Quære*, whether if he had gone on to London by the accommodation train, he would have been bound to take the next through train from thence.

## APPEAL from the County Court of Brant.

Declaration, that the defendants were and are common carriers of passengers from the City of Buffalo, in the State of New York, one of the United States of America, to the City of Detroit, in the State of Michigan, one of the said United States, through the Province of Canada; and as such carriers the defendants, for reward to them in that behalf paid by the plaintiff, received and took the plaintiff at Buffalo aforesaid as a passenger, to be by the defendants carried on certain railway trains and cars from Buffalo aforesaid to Detroit aforesaid; and although the defendants did carry the plaintiff a part of the distance from Buffalo aforesaid to Detroit aforesaid, to wit to the Saint Catharines Station on their railway, yet the defendants refused to carry the plaintiff the rest of the distance from Saint Catharines aforesaid to Detroit aforesaid, or any part thereof; and violently and with force and arms, and without any lawful cause for so doing, prevented the plaintiff at Saint Catharines aforesaid from further riding on their said cars, and from getting on or remaining on said cars, or further proceeding on their said cars to or towards Detroit aforesaid,—by means whereof the plaintiff was forced to return to the said City of Buffalo, and by means of other modes of transportation procure and pay again for his passage, and lost much time, and was put to great expense and inconvenience.



*Pleas* 1. Not guilty, by statute, 16 Vic. ch. 99, secs. 10 and 12, Public Act.

2. That the plaintiff was not received by the defendants as a passenger, to be carried by them for reward, as in the declaration alleged.

At the trial in the court below it appeared that the plaintiff purchased from the agent of the defendants in Buffalo, in the State of New York, a ticket as follows:—

“New York Central Railroad Co.  
Buffalo to Detroit.

Good for one first class passage only, upon presentation of this ticket with checks attached, and good only for twenty days from date. Not good unless dated and endorsed by the receiver.”

“Via N. Y. C. and Gt. W. Railroads.

Conductors are required to detach from this ticket and take up the checks over their respective lines. The conductor upon the road at the end of the route will take up the ticket as well as the check over his road. If the checks belonging to this ticket are detached, it will not be received for passage.”

(Signed) EDWARD F. FOLGER,  
Chief Clerk.

1462.	“1462. Issued by New York Central R. R. Co.		Detroit.
	Great Western Railway.		
	Suspension Bridge to Detroit.		
	First Class.		

4 This check is forfeited if detached.” 1

It was surmised, and the fact most probably was, that there had been another check or coupon attached to this ticket, authorizing the holder to pass from Buffalo to the Suspension Bridge by the N. Y. Central Railroad. It was not shewn when the ticket was sold, and it might have been sold within twenty days before the committing of the grievance complained of; on the other hand, it might have been sold in May, 1864. It was not dated and indorsed, so far as the evidence shewed. The agent swore that he was sure this ticket, numbered 1462, was not sold by him in July or August, 1864.

It was proved that about the 24th of August, 1864, the plaintiff came to St. Catharines by the afternoon accommodation train of the defendants. This train was due at St.

Catharines at 4.05 p.m., and it ran only as far as London. St. Catharines is the second station from the Suspension Bridge. The plaintiff left the train there and went into the town. It was stated that a passenger for Detroit by the accommodation train would be delayed six or seven hours at London, and must take the night express to go to Detroit. He would arrive at Detroit at the same time as if he had waited at the Suspension Bridge and entered the night express there. The plaintiff went that night back to the station at St. Catharines, apparently in order to go on to Detroit by the next train. On his arrival at St. Catharines he shewed his ticket (like the one set out) to the defendants' agent at St. Catharines, and asked if that ticket was good by that train; the agent said No. It appeared also, that the plaintiff was told by the defendants' ticket examiners at St. Catharines that he could not enter the night express train on that ticket at St. Catharines, as it was a local station, and the agent said that if after that notice the plaintiff had offered to get upon that train he would have been forcibly prevented. Evidence was given that it was cheaper to take a ticket like the one produced, for a passage from Buffalo to Detroit, than to take a ticket first to the Suspension Bridge, next from thence to St. Catharines, and lastly from St. Catharines to Detroit. The plaintiff, being thus prevented from going to Detroit, returned to Buffalo.

This was the plaintiff's case, to which it was objected, *first*, that there was no proof that the plaintiff was ejected from the cars or forcibly prevented from riding thereon; *second*, that the ticket was marked good for only twenty days, and the evidence shewed that it was bought in May; *third*, that the ticket did not authorize any stoppage over at St. Catharines.

It was agreed the case should go to the jury, and if they found for the plaintiff that the defendants might move in term to enter a nonsuit.

The defendants then gave evidence, from which it appeared that the plaintiff came in an accommodation train of the defendants from the Suspension Bridge on the ticket produced: that the conductor of this accommodation train

recognized the right of the plaintiff to travel by that train, and punched the ticket: that the plaintiff might have gone on by that train to London, beyond which station it did not go, and that he might have taken the night express train, that night at London, and have gone on to Detroit. The defendants' witnesses put it beyond doubt that the plaintiff, having left the accommodation train at St. Catharines, was told by the company's officers that he would not be allowed to enter the night express train that evening for Detroit on the ticket which he had, and consequently he did not attempt it.

The jury were asked, first, whether the defendants, after undertaking to carry the plaintiff from Buffalo to Detroit, refused to allow him to travel on their train from St. Catharines for the rest of the journey; secondly, whether the plaintiff was so prevented from travelling within the time that they contracted to carry him.

They found for the plaintiff, and a rule *nisi* afterwards granted to enter a nonsuit on the leave reserved was discharged. The defendants appealed from this decision.

*M. C. Cameron*, Q.C., for the appellants.

*E. B. Wood*, contra.

DRAPER, C. J., delivered the judgment of the court.

We agree in the view of the learned judge, that the evidence substantially supports the allegation, that the plaintiff was prevented from continuing his journey by the refusal of the defendants to allow him so to do.

The question in dispute seems to me reduced to this—whether the defendants were justified in their refusal. What did the plaintiff require? What did the defendants refuse?

The plaintiff's contention, pushed to its full extent, involves the assertion of a right to stay over at any and every station between the Suspension Bridge and Detroit, at which the train in which he was travelling should stop, provided he was travelling within twenty days from the date when he received his ticket. On the other hand, the defendants' contention would limit the plaintiff to one



continuous journey within the twenty days, not allowing him to stay over at any station.

The plaintiff had an unquestionable right, if he had remained at the Suspension Bridge till the night express train started, to have been carried in that train to Detroit, and this the defendants admit; and they admit further, as the evidence shews, that he had a right to commence his journey from the Suspension Bridge in an accommodation train running towards but not so far as Detroit, and to complete it by another train to that city.

If the plaintiff is right, it can make no difference in what train of the defendants he began his journey, whether a train going the whole distance or a part only. In either case he can stop at any intermediate station he pleases, and remain over as long as he chooses, within the limit of twenty days.

This right of stopping is not in terms contained in the contract, for there is not a word in it referring to intermediate stations from which such right can be inferred. It rests solely on the statement that the ticket is good for twenty days from date. The argument is that the extension of time is given for the purpose of affording the holder of the ticket the privilege of stopping at intermediate stations, because the continuous journey would occupy less than twenty-four hours.

But if this were intended, the simpler and more obvious course would have been to have expressed the permission or condition as relating to *place* rather than to *time*, whereas time only is mentioned.

It is further apparent that the railway fares from station to station between the Suspension Bridge and Detroit amount to a larger sum than the single fare for the whole distance on a through ticket.

It may no doubt be the policy of the defendants to attract through travel, and there may be competition with other companies inducing them to place their fares for through journeys at lower rates than the aggregate of the fares from station to station would amount to. But these considerations are adverse to an inference that an extension of time,

within which the traveller would have a right to make the through journey, was given to enable him to stop at every intermediate station.

The practice which the defendants have sanctioned is not consistent with a strict application of the principle for which they contend, for to be rigidly consistent they should not admit a through passenger into a train which will not convey him to the end of his journey. They do however allow such a passenger to travel in a mode which makes a break in point of time in the journey—that is, to commence in a train going only part of the way, and which will reach its destination some hours before the through train will arrive by which he can complete his journey; and they might find difficulty in maintaining that such traveller was bound to go on by the first through train, provided the twenty days were still current. That question however does not arise here, and it does not, in our opinion, follow that because they are willing he may use an accommodation train as far as it will convey him on his journey, and may complete that journey by another train, he may stop at as many intermediate stations as suits his convenience, with no other restraint than that of completing his route within the twenty days.

No authorities have been referred to, and we have not seen any which govern this question. Our conclusion is, that the defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train of the defendants from the point of commencement, and entitling him, if the train in which he started did not go the whole distance mentioned in his ticket, to be conveyed the residue of that distance in some other train of the defendants—the whole journey to be completed within twenty days from the date of the ticket; and that the contract did not confer on the plaintiff a right to stop at every or any intermediate station, though within the limited twenty days. As a consequence, the defendants were not guilty of a breach of duty arising from their contract, by refusing to carry the plaintiff from St. Catharines to Detroit under the circumstances shewn in evidence.

We think therefore the appeal should be allowed, and that judgment of nonsuit should be entered against the plaintiff in the court below.

Appeal allowed.

### BRIGGS V. THE GRAND TRUNK RAILWAY COMPANY.

*R. W. Co.—Ticket “good for this day only”—Time tables, effect of—Pleading.*

The declaration stated that defendants contracted to carry the plaintiff as a passenger from G. (Gananoque) to T. (Toronto,) but wrongfully expelled him from the cars.

Defendant pleaded that on the 8th of December, 1864, they sold to defendant at G. a ticket from thence to T. “good for this day only”: that he thereupon took the train at G., which proceeded to T. by a continuous journey, but left it without defendants' consent at C. (Colborne), and on the 10th of December entered another of their trains going to T., by which they refused to carry him, which was the grievance complained of.

To this the plaintiff replied, that before his purchase of the ticket on the 8th of December, defendants had publicly advertised, by their time table, that a passenger train would leave G. at 3.5 P.M. and arrive in Toronto at midnight: that he purchased his ticket before the arrival of the train at G. on that day, on its way to T., on the faith of such representation, but the train did not leave G. until 6 P.M., and defendants well knew that it would not, and it did not, arrive at T. until the morning of the 9th: that on its arrival at C. the plaintiff, finding the train could not reach T. until the 9th, left it, and defendants waived the terms of their ticket, and the plaintiff on the 10th claimed to go on by the morning train passing C. for T. on this ticket, but was prevented.

*Held*, on demurrer, 1st. That the plea, without reference to the replication, was a good defence, for the ticket was a contract by defendants to convey the plaintiff from G. to T. in one *continuous* journey, to commence on the date of issuing it.

2. That the replication was bad, for even if the time table could be construed as incorporating a condition as to time into the contract, yet as the contract was partially executed for the plaintiff's benefit by his conveyance to C., the breach could only entitle him to compensation in damages.

3. That the time table could not be treated as part of the contract, but amounted to a representation only; and in that view the plaintiff should have averred that he bought his ticket on the faith of such representation before the time specified for the train to leave G., not merely before the arrival of the train there, for if after the time specified, he knew as well as defendants that the time table had been departed from.

*Quære*, whether the plaintiff by leaving the train at C., and thus making it impossible for defendants to perform the substantial part of their contract, by conveying him in one continuous journey to T., had not forfeited all right under it.

DECLARATION.—*First count*.—For that the defendant<sub>s</sub> assaulted the plaintiff, and forcibly expelled him against his will from a railway car.



*Second count.*—And for that the defendants were carriers of passengers upon a railway from the village of Gananoque in the County of Leeds, to the City of Toronto, for reward to the defendants; and the plaintiff became and was received by the defendants as a passenger on their railway, for reward, to be by them carried upon their said railway on a journey from the said Village of Gananoque to the said City of Toronto, for reward to the said defendants; yet the defendants did not carry the plaintiff from the said Village of Gananoque to the said City of Toronto, but wrongfully expelled him from their train and cars, and refused to permit him to proceed on his journey—by reason whereof the plaintiff was detained on the way a long time, and prevented from arriving at the City of Toronto aforesaid in time to be conveyed to the City of Hamilton, where the plaintiff had to transact and carry on urgent and necessary affairs and business, on a certain other railway train running between the said City of Toronto and the said City of Hamilton, and connecting with the said train of the defendants; and was also thereby put to great trouble and expense, in supporting himself on the way and procuring another passage to the said City of Toronto.

*Second plea.*—That the defendants are and were at the said times when, &c., in the first and second counts mentioned, carriers of passengers for hire under the several provisions of "*The Railway Act*" of this Province: that the defendants before the time when, &c., to wit on the 8th of December now last past, at their station at Gananoque, sold to the plaintiff a ticket for a passage from Gananoque to Toronto, and which said ticket was and is, with the exception of the date thereof, which is herein omitted, in the words following, or to that effect:—

"Grand Trunk Railway. Good for this day only. Gananoque to Toronto. First class."

That the said ticket was dated on the day it was issued to the plaintiff by the defendants, as above mentioned, of all which the plaintiff had notice; and that the plaintiff took and received the said ticket from the defendants upon the terms and conditions endorsed on the face thereof as afore-

said: that the plaintiff, in pursuance of the said contract contained upon said ticket, entered upon a first class train of the defendants upon the day of the date of the said ticket, on the way from Gananoque to Toronto, and which train on the day of the date of said ticket did proceed from Gananoque to Toronto by a continuous journey, and upon the said train the defendants were ready and willing to have taken and carried the plaintiff from Gananoque to Toronto by a continuous journey, of all which the plaintiff had full and due notice:—that the plaintiff proceeded upon said train and on the said ticket from Gananoque towards Toronto, a part of the journey, to wit, to the Village of Colborne; and that the plaintiff, without the consent of the defendants, left the defendants' said train and their railway, and that the said train upon which the said plaintiff was a passenger as aforesaid then, on the said day of the date of the said ticket, proceeded to Toronto without the plaintiff: that afterwards, that is to say, on the 10th of December aforesaid, the plaintiff entered upon a train of the defendants then proceeding to Toronto, and the defendants' servants then in charge of the said train demanded from the plaintiff his lawful fare: that thereupon the plaintiff presented the said ticket above mentioned, and required the defendants to take and carry him from Colborne to Toronto upon the said ticket, although the time for which the said ticket was good for a passage had expired: that the defendants' conductor in charge of the said last mentioned train refused to accept the said ticket, and demanded from the plaintiff his lawful fare, which the plaintiff refused to pay, or to pay any fare, and thereupon the said conductor so in charge of the said train put the plaintiff off the defendants' said train near a dwelling house, having first stopped the train, and using no unnecessary violence in so putting the plaintiff off as aforesaid—which are the premises in the said first and second counts mentioned.

*Replication*, that before the purchase of the said ticket therein mentioned, which said ticket the plaintiff purchased of the defendants on the 8th of December, 1864, at Gananoque in said plea mentioned, the defendants had publicly

advertised, by a published train time table, that a passenger train of their railway would leave Gananoque for Toronto at three hours and five minutes in the afternoon, and would arrive at the City of Toronto at the hour of midnight on the same day, and such time table so advertised was the time table on which the said defendants were running the said passenger train on the said 8th day of December ; and the said plaintiff purchased the said ticket to be carried on the said passenger train so advertised to leave Gananoque for Toronto aforesaid at three hours and five minutes in the afternoon of the said 8th day of December aforesaid, and so purchased the said ticket before the arrival of said passenger train at Gananoque aforesaid, on its way to Toronto aforesaid, and to be carried thereon from Gananoque to Toronto on the said 8th day of December ; and so purchased the said ticket on the faith of the representation of the defendants so made in said advertisement, that he would be carried thereon, and that the said train would arrive at Toronto aforesaid by the hour of midnight on that day ; but the fact is that the said passenger train did not leave Gananoque for Toronto aforesaid until long after the said time so advertised for leaving Gananoque, to wit, not until the hour of six o'clock in the afternoon of the said 8th day of December ; and the defendants well knew that the said passenger train would not arrive at Toronto aforesaid till long after the time so advertised for arriving at Toronto, and not until the morning of the 9th day of December aforesaid ; and the fact is that the said passenger train did not arrive in Toronto until the hour of four o'clock in the morning of the said 9th day of December. And the plaintiff saith that on the arrival of the said train at Colborne, an intermediate station of the said railway, he, the plaintiff, finding, as the fact was, that the said train would not and could not arrive at Toronto aforesaid until long after the time so advertised for arriving at Toronto, to wit, not until the morning of the 9th day of December, the plaintiff left the said train at Colborne aforesaid ; the defendants well knowing that the said passenger train would not arrive at Toronto aforesaid till the following morning of the said 9th day of December aforesaid. And



the plaintiff says that the defendants waived the terms and conditions endorsed on the face of the said ticket; and the plaintiff thereafter, on, to wit, the 10th day of December, entered on the morning passenger train of the said railway, leaving Colborne aforesaid at the hour of nine o'clock in the forenoon of that day, which said train could and would arrive at Toronto aforesaid on the said 10th day of December, and on being called on to pay fare for being carried on said train to Toronto aforesaid by the conductor of said train, presented to him the said ticket, which the said conductor refused to take, and refused to allow the said plaintiff to travel to Toronto on the said train on the said ticket; and the plaintiff refusing to pay another fare for his passage to Toronto, the said conductor forcibly ejected the plaintiff from said train.

*Demurrer*, on the grounds that the said replication is a departure from the first two counts of the declaration to which said second plea is pleaded as an answer. That the said replication admits the statement contained in the said second plea and confesses the same, and does not set up any answer in law thereto. That the said replication shews quite another cause of action than that contained in the first and second counts, and is not an answer to the said plea, but a departure from the causes of action to which said plea is pleaded. That the said replication shews that the plaintiff and the defendants entered upon the performance of the contract in the said plea mentioned, and that the train on which the defendants were carrying the plaintiff to Toronto continued on its journey to Toronto, and that the plaintiff left the same without the consent of the defendants; and the plea shews no reason for his so doing, and thereby preventing the defendants from performing their contract in said plea set up and admitted in said replication.

*M. C. Cameron*, Q.C., for the demurrer.

*D. B. Read*, Q.C., contra, cited *Ollive v. Booker*, 1 Ex. 423; *Barr v. Gibson*, 3 M. & W. 389; *Bryant v. Beattie*, 4 Bing. N. C. 263; *Gregg v. Wells*, 10 A. & E. 90; *Winstone v. Linn*, 1 B. & C. 460; *Studdy v. Sanders*, 5 B. & C. 639;

*Farewell v. Grand Trunk R. W. Co.* 15 C. P. 427; *Cunningham v. The Grand Trunk R. W. Co.*, L. C. Jur. March 1864, p. 67; *Parsons on Contracts*, vol. ii. 49, 59; *Add. Con.* 1122.

DRAPER, C. J.—The second count and the second plea disclose that on the 8th of December, 1864, the plaintiff purchased at Gananoque from the defendants a ticket entitling him to a first class passage by their railway from that station to Toronto. This ticket on the face contained the following words, "Good for this day only." On that day the plaintiff left Gananoque, by a train of the defendants, which proceeded onwards, stopping at the usual intermediate stations, to Toronto, in one continuous journey. At Colborne, one of these intermediate stations, the plaintiff left this train of his own accord. On the morning of the 10th of December, the plaintiff entered another train of the defendants, which was just leaving Colborne for Toronto, and insisted on being carried by virtue of the ticket he had purchased on the 8th of December. The defendants insisted that he should pay fare from Colborne to Toronto, and denied that the ticket was any longer available, and as he refused to pay any other fare they expelled him from the train.

By the replication to the second plea it further appears that before the 8th of December, 1864, the defendants had published a train time table, according to which they gave notice they would run their trains, and by this it was stated that a passenger train would leave Gananoque every day at five minutes past three in the afternoon, and arrive at Toronto at midnight: that the plaintiff purchased his ticket for this train, and before the train arrived at Gananoque, on the faith of this time table: that the train did not leave Gananoque before six in the evening of the said 8th of December, and the defendants knew it would not reach Toronto until the morning of the 9th, and that in fact it did not arrive there until four o'clock that morning: that the plaintiff, on his arrival at Colborne, finding that the train could not reach Toronto until long after the hour advertised, left it. He

avers that the defendants waived the terms and conditions inserted in the ticket, and claims that under these facts he had a right to be carried to Toronto by any train of the defendants going there which he might choose, as his ticket had become a general contract on the part of the defendants to convey him from Gananoque to Toronto, and was no longer limited to the day on which it was issued.

I think the second plea, considered without reference to the replication, a good answer to the first and second counts. The words "Good for this day only," create a limited contract on the defendants' part to convey the plaintiff in one continuous journey from Gananoque to Toronto, to be commenced on the day of the issuing of the ticket. The plea involves no question as to defendants' obligation to complete the journey on that day. The sole question presented is the right of the plaintiff upon this contract to break the journey into two or more parts, resuming and completing it at his own convenience. I have already expressed my opinion on this point in the case of *Craig v. The Great Western R. W. Co.*, (a) and shall not now further discuss it.

The replication however is designed to qualify this contract by making the time table part of it, converting it into a contract to convey the plaintiff from Gananoque to Toronto on the 8th of December, 1864, to leave at one fixed hour and to arrive at another; and the plaintiff's argument is that on these pleadings the proper legal inference is, that as the demurrer admits that the defendants well knew the train could not, as in fact it did not, arrive at Toronto until four in the morning of the 9th of December, they were guilty of wilful misrepresentation to the plaintiff in this respect, and consequently of legal fraud: that the defendants thereby threw their contract at large, making it a general contract to convey the plaintiff from Gananoque to Toronto whenever the plaintiff pleased to avail himself of it, and not a special contract to convey him on the day named. If this be so, the replication displaces the defence.

But I am of opinion that the time table is not to be taken as incorporating a condition into the contract, though the

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(a) Ante, page 504.



objection made by the defendants, that the replication is a departure, apparently rests on the ground that it sets up a new contract in substitution of that relied upon in the second count. I think the time table amounts only to a representation, and not to an integral part of the contract. Then if the plaintiff relies on this representation being made to him fraudulently, which the averment that the defendants well knew that the train would not arrive at the specified time must be intended to affirm, he ought also to have averred that he purchased the ticket on the faith of this representation before the time stated in the time table for the train to leave Gananoque, whereas he only avers that he purchased it "before the arrival of the said passenger train at Gananoque," which, consistently with the other statements in the replication, may have been just before six, instead of five minutes past three, p.m. For if the plaintiff made the contract for his passage after the time stated for the train to start, he knew as well as the defendants did of this variation from the time table, and must be taken to have contracted according to the state of facts existing at the time it was entered into.

There is however another ground upon which I am clearly of opinion in favour of the defendants. The contract was partially executed to the plaintiff's benefit, for he entered the train and was conveyed part of the journey. This he states in the replication, and this was *pro tanto* a substantial performance by the defendants. Even if the arrival at Toronto by midnight of the 8th of December was a condition, the breach of it would, after such partial execution, only entitle the plaintiff to a compensation in damages. And the replication expressly states that the plaintiff, finding on the arrival of the train at Colborne that the train could not arrive at Toronto until long after the time advertised, left the train, thus impliedly admitting a part performance of the defendants' contract to convey him. I refer to the judgment in *Behn v. Burness* (3 B. & S. 751) as establishing the principles on which I base my conclusion. It is unnecessary to review the earlier authorities which are cited there.

I think it unnecessary to discuss the question whether the plaintiff by leaving the train at Colborne, and thereby rendering it impossible for the defendants to perform what I deem to be the substantial part of their contract, namely, the conveying the plaintiff in one continuous journey to Toronto, has not forfeited all right under it. Whether this be so or not, I can find no valid ground for adopting the conclusion suggested by the replication, because I think that at all events, admitting the liability of the defendants to compensate the plaintiff for any damage he might have sustained by not reaching Toronto at the hour named in the time table, to maintain such a claim he should have continued in the train till it did arrive. The defendants' breach of performance of the first contract could not create another and a different contract; or, if it did, the plaintiff should have declared upon it, and instead thereof by replying it he subjects his pleading to the objection taken, of departure.

The case of *Farewell v. The Grand Trunk Railway Co.*, (15 C. P. 427,) does not apply to the principal question in this case, though, as appears to me, it is a well considered decision.

We were also referred to the case of *Cunningham v. The Grand Trunk Railway Co.*, (Lower Canada Jurist, March 1864,) in which upon a railway ticket somewhat similar to that in *Farewell's* case above noted, namely, a return ticket good for the day on which it was issued "and the following day only," it was held that a custom on the part of the defendants not to insist upon the express terms of the contract, entitled the holder of such a ticket to construe it according to the custom, and contrary to its *primâ facie* signification. We need not enquire what amount of evidence would be requisite to establish the existence of such an alleged custom, nor how many cases in which the company had shewn an indulgence (for such in the first instance it must have been) to the holders of such tickets who presented them after "the following day," would entitle a subsequent party to insist that as to him this extension of the terms of his ticket had become a strict right. To make a good custom, in the sense in which that word is properly used in

our law, it must have been followed so long that the memory of man runs not to the contrary, must have been continuous, peaceable, reasonable and certain, not at the option of every person whether he will use it or not, and not inconsistent with or in opposition to other customs. No such question arises on this demurrer.

We think the defendants are entitled to our judgment.

I refer also to *Hurst v. The Great Western R. W. Co.*, 11 Jur. N. S. 730.

HAGARTY, J.—If the case referred to in Lower Canada depends upon any local law I have nothing to say with regard to it, but if it is founded upon the general law which governs us, I must respectfully dissent from it in toto.

MORRISON, J., concurred.

Judgment for defendants on demurrer (a).

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(a) See *Prevost v. The Great Eastern R. W. Co.*, 13 L. T. Rep. N. S. 20.



## WIDDER V. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

*Arbitration under "The Railway Act," C. S. C. ch. 66—Lands injuriously affected—Action on the award—Plea of fraud—Admissibility of evidence not before the arbitrators—Form of notice appointing arbitrators—Improper conduct of defendants with the jury—Waiver, &c., &c.*

The plaintiff claimed compensation from defendants for injuriously affecting his land in the town of Goderich by the construction of their railway, and defendants having denied that the land was so affected within the meaning of the statute, were compelled by mandamus to go to arbitration. The plaintiff's land was on a navigable river, extending to high water mark thereof, and the injury complained of was that defendants had built their railway along the river on piles in front of his land, and cut off his access to the water. The defendants appointed one M., their own engineer, as their arbitrator, the plaintiff appointed one MacD., and these two, after some correspondence, not agreeing upon the third, the plaintiff applied to the County Court Judge, who appointed one P. Both parties appeared before the three arbitrators, and after the plaintiff had concluded his evidence, defendants' counsel gave what was intended as a notice of desistment under the act. He and the defendants' arbitrator then declined to call witnesses and withdrew from the arbitration, being first notified that the other two arbitrators would go on and award, which they did without separating. The notice of desistment was afterwards held by the court to be ineffectual.

To an action brought upon the award defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was obtained by the fraud, covin, and misrepresentation of the plaintiff and of the arbitrators making it; and to support such plea they called several witnesses to prove that the sum was grossly excessive. None of these witnesses however had been brought forward at the arbitration, although defendants could have called them then as well as at the trial; the award was clearly sustained by the only evidence before the arbitrators; no attempt was made to impeach the credit of any of the witnesses who gave it; no misconduct was proved on the part either of the plaintiff or of the arbitrators; and the arbitrators, being sworn, denied any improper motive.

*Held*, that under these circumstances the evidence as to value of witnesses not before the arbitrators was inadmissible in support of the plea.

*Quære*, whether anything short of actual fraud could support such a plea. See *Daly v. These Defendants*, 16 U. C. R. 245.

The jury were directed that if the plaintiff urged to the arbitrators that he had an exclusive right to the water when he had not, it was evidence to sustain the plea of fraud. *Held*, that no argument used by the plaintiff to enhance his claim or place his case in the best light, could be a fraud.

The jury were also told that the plaintiff's right of access to the water remained as before, subject to defendants' right to use their railway. *Held*, that this was a direction calculated to mislead, for the convenience of access was materially interfered with, and the jury might confound the right with the power of exercising it.

The day before the trial defendants applied to the judge at *Nisi Prius* to order a view of the land in question, which was refused, as it lay in another county. Several of the special jury summoned to try the cause were then, on the same day, taken by defendants in a special train to view the land. Notice that they would be so taken had been given by defendants, who offered to take any one representing the plaintiff,

but the plaintiff declined to take any part in the proceeding. The jury were provided by defendants with refreshments, and accompanied by M., the defendants' arbitrator, who however said that he had no discussion of the case with them. The plaintiff's counsel, before the trial began, called this fact to the attention of the judge, and protested, reserving his right to object. *Held*, that the proceeding was improper and irregular, but that the plaintiff having submitted his case to the jury with full knowledge of it, was precluded from objecting.

At the trial defendants moved for a nonsuit, objecting,

1. That defendants had a right to build their crib-work in the river, and that it was improperly considered as part of the damage. *Held*, that this objection had been disposed of by the judgment awarding a mandamus.
  2. That evidence was improperly received of the cost of constructing crib-work to make the plaintiff's property available, he having no right to make it. *Held*, clearly no ground of nonsuit.
  3. That defendants' notice appointing their arbitrator was not accompanied by a surveyor's certificate and it denied that the plaintiff was entitled to any compensation. *Held*, too as no land was taken, and defendants denied the plaintiff's right to any thing, the certificate was unnecessary. *Held*, also, that such notice need not be under the defendants' corporate seal.
  4. The notice described the plaintiff's claim as being "in respect of the alleged damages claimed by you for the construction of their railway along the margin of the river Maitland, northerly of your land in the town of Goderich, as the same is now made and built." *Held*, that this sufficiently described the subject matter of the dispute, and the property alleged to be injuriously affected. *Held*, also, that objections urged by a party to his own notice should be examined most strictly.
  5. That there was no sufficient evidence of disagreement between the two arbitrators to warrant the appointment of the third by the County Judge. *Held*, that this objection had been waived by defendants attending before the three arbitrators.
  6. *Held*, also that there was no variance between the award, set out below, and the submission.
  7. That the award was made without the day's notice to defendants' arbitrator required by the act. *Held*, no objection, for it was made at the same meeting from which he withdrew.
  8. That the appointment by the judge should have been endorsed on the company's notice. *Held*, clearly no objection, the statute not requiring it.
  9. *Held*, also, no objection that the arbitrators awarded costs, for if unauthorized it was easily separable from the rest of the award.
- Remarks by the Chief Justice on the appointment by defendants of their own engineer as arbitrator, and upon the duty of an arbitrator.

**DECLARATION.**—The first count set out that the parties entered into an arbitration to ascertain the amount of compensation to be paid to the plaintiff for damages to his land injuriously affected by the construction of defendants' railway, the appointment of one Thomas N. Molesworth by defendants, and of one Peter Alexander MacDougall by the plaintiff, and that, as they could not agree on a third, the County Judge appointed one Albert Prince: and that MacDougall and Prince on the 29th of June, 1864, made an award of \$10,000 in favour of the plaintiff. Breach, non-payment.

*Second count*, for the costs of the arbitration.

Common Counts were added, for money awarded, and for costs.

*Pleas to the first Count*.—1. That the plaintiff and the defendants did not enter into an arbitration for the purpose and in manner as in the first count alleged.

2. That neither the said Thomas N. Molesworth nor the said Peter Alexander MacDougall was appointed arbitrator, as in the first count alleged.

3. That the said Thomas N. Molesworth and Peter Alexander MacDougall did not disagree as to the appointment of the said third arbitrator, within the meaning of the statute in that behalf; nor did the said Robert Cooper, then being judge of the said United Counties of Huron and Bruce, duly and in pursuance of the said statute appoint the said Albert Prince to be the third arbitrator, in manner and form as in the first count alleged.

4. That the said Peter Alexander MacDougall and Albert Prince did not make and publish the said award in the first count mentioned, as in that count alleged.

5. That the said supposed award was not made and published on the said 29th day of June, or on any other day, at a meeting<sup>3</sup> of and by the said arbitrators, or any two of them together, at a meeting of which all the said arbitrators had notice.

6. The replication to this plea was demurred to and held good on demurrer.

7. This plea was held bad on demurrer.

8. On equitable grounds, that the sum awarded in and by the said supposed award in the first count mentioned, to be paid to the plaintiff by the defendants as compensation for the injuriously affecting the plaintiff's land by the construction of the defendants' railway, is excessively and fraudulently exorbitant, and the said supposed award was made by the fraud, covin, and misrepresentation of the said plaintiff and of the arbitrators making the same.

To the common counts, never indebted (*a*).

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(*a*) The pleadings are more fully set out in the report of the judgment given on the demurrers, ante, page 222.



The trial took place at London, before *John Wilson, J.*

A special jury had been struck by the defendants. On the case being called on, the plaintiff's counsel called the learned judge's attention to the fact, that the defendants had taken a number of the special jurors by a special train on the day previous to Goderich, paid their expenses, and brought them back, and that they were accompanied by Molesworth. Defendants replied that they had been most anxious that the jury should view the ground, but as the venue was laid in another county an order for a view could not be obtained: that it had been publicly notified to the court and jury, that the jury would be taken if they desired it: that defendants offered to take the plaintiff, or any one on his behalf: that some of the jury intimated they would like to go, and Molesworth went with them to shew the ground, but under instructions to have no discussion with them on the case.

It may be well to notice here what was sworn as to this point in the affidavits filed on the rule:—that this public notice had been given on the day before the trial, in court, after the judge, having been applied to, had declined to make any order: that the plaintiff objected: that some eight or ten of the jurors went in a special train, accompanied by Molesworth, who said he paid for their dinners in Goderich, and pointed out the ground, but had no discussion of the case with them, and brought them back on the same day to London.

The trial then proceeded.

It appeared that the plaintiff had his property and residence in the town of Goderich, his land running down in a slope to the edge of the river Maitland. The defendants had built cribs, &c., in the harbour, some feet above the water level, along the whole front of the plaintiff's land, but not actually encroaching on it, and had laid their railway on these cribs, thereby excluding the plaintiff from access to the river or harbour except across their railway. The plaintiff claimed compensation, and defendants insisted he was not damnified, and after much disputing defendants were compelled by mandamus from this court to enter into the statutable arbitration. See *The Queen v. These Defendants*, 23 U. C. R. 208.

The plaintiff appointed MacDougall, and defendants named Molesworth, who had been their own engineer during the construction of the railway, as arbitrators. These gentlemen could not agree on a third, and under the statute the County Judge was applied to to name a third. Notice of the time of applying to him was served, but Mr. Wood, defendants' attorney, was not able to be in Goderich at the time appointed. The judge was urged by Mr. Wood's agent to adjourn the appointment, but he refused, saying he would appoint Mr. Prince, a gentleman against whom there could be no objection.

The three arbitrators met, and witnesses were examined for the plaintiff, and before any evidence was adduced for the defendants defendants gave what they called a notice of desistment under the statute, and Molesworth, their arbitrator, withdrew from the reference. This notice, as appeared on the record, was adjudged by the court, upon demurrer, to be not available for them.

The plaintiff put in and proved certain notices and letters, and the appointment of Mr. Prince by the County Judge. The award was then proved, executed by Prince and MacDougall (a). The evidence taken at the arbitration was produced and proved.

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(a) The award was as follows:—"We, the undersigned, two arbitrators, being a majority of the arbitrators appointed under the provisions of "*The Railway Act*," in the matter of the reference between Charles Widder and The Buffalo and Lake Huron Railway Company—having in conjunction with Thomas N. Molesworth, the arbitrator appointed by the said The Buffalo and Lake Huron Railway Company, notified and met the parties, and heard the allegations and proofs on behalf of the said Charles Widder and the arguments on behalf of the said Company, and the said Company producing no proofs, and the arbitrator for said Company refusing to take part in the award—*Do award and determine*, of and concerning the matters referred to us, that the said Company should pay to the said Charles Widder as compensation for their injuriously affecting his land near the mouth of the navigable river Maitland, bounded by the said river on the north and extending to the high water mark thereof, being composed of lots numbered thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen, and the easterly portion of lot numbered B., and hill side fronting thereof, containing by admeasurement 2.70 acres and one half of an acre, being a portion of the office reserve in the Town of Goderich, the sum of ten thousand dollars (\$10,000.)

*And we do further award*, order and direct all costs, as taxed by the Judge of the County Court of the United Counties of Huron and Bruce, if not agreed on, to be paid by said Company.

*In witness whereof* we have hereunto set our hands this twenty-ninth day of June, A.D., one thousand eight hundred and sixty-four.

(Signed) ALBERT PRINCE.

(Signed) P. A. MACDOUGALL."

In presence of  
(Signed) HAMILTON PARKE O'CONNOR. }

It appeared that on the afternoon of the second day of the arbitration Molesworth withdrew, saying he had taken advice on the subject, Mr. Prince telling him that the other arbitrators had decided to go on.

They at once proceeded and made up their award, the defendants offering no evidence. The notice of desistment was put in by defendants after the arbitrators had overruled certain objections made by defendants' counsel as to certain evidence offered. Then Molesworth withdrew, as also did defendants' counsel.

MacDougall was examined, and, against the plaintiff's objection, the learned judge ruled that he could be cross-examined as to the grounds of his award, and that other evidence than that submitted to the arbitrators might be given to support the charge of a fraudulently exorbitant award.

It was urged by the plaintiff that his land was most valuable for warehouses along his water frontage, and that defendants' crib work and track, and the ordinary user of the line, cut him off practically from the water: that a road would have to be made by the plaintiff before he could have warehouses there, and for this the bank would require cutting away.

All attempt at improper influence on the plaintiff's part was denied, and the arbitrators swore they believed their decision was just.

Defendants raised the following objections, on which leave was reserved to move for a nonsuit:—

That defendants had a right to build their crib work on the river Maitland, which the arbitrators improperly took into consideration as part of the damages: that they took evidence of the cost of making crib work to make the plaintiff's property available for store-houses, he having no right so to do, or go beyond high water mark: that anything done by them under the 19 Vic. ch. 21, sec. 37, was not within the provisions respecting arbitration:

That the notice given by defendants was insufficient, not containing the statutable requirements: that it was not ac-



accompanied by the certificate of a surveyor, and not under defendants' corporate seal. (a) :

That there was no disagreement of the two arbitrators warranting the appointment made by the County Judge, as there had been no meeting of the two, and the letters put in did not sufficiently shew a disagreement, which could not be established by writing only; and that the arbitrators must be sworn before disagreeing :

That the form of notice of intention to apply for such appointment was insufficient, in not stating that the arbitrators had failed to disagree :

That the award did not pursue the submission, in this, that the submission is in respect of the alleged damages claimed by the plaintiff for the construction of defendants' railway along the margin of the river Maitland, northerly of the plaintiff's land in the town of Goderich, as now built, and the defendants deny his right to any compensation; and the award is for injuriously affecting the plaintiff's land near the mouth of the river Maitland, bounded, &c., (as in the award) :

That the award was made without notice to Molesworth of the intention to make or of making it, though the statute requires one clear day's notice of the intention to meet for that purpose.—Consol. Stat. C., ch. 66, sec. 11, subsec. 11 :

That the appointment by the judge should have been endorsed on the company's notice :

(a) The notice given by the company was as follows :—

In the matter of Arbitration	} You are hereby notified that the Buffalo and Lake Huron Railway Company have appointed T. N. Molesworth, of the town of Brantford, Esquire, to be their arbitrator in the matter of the reference in respect of the alleged damages claimed by you for the construction of their railway along the margin of the River Maitland, northerly of your land, in the town of Goderich, as the same is now made and built; and that the said company deny that you are entitled to any compensation in respect of the same. And you are hereby further notified to name your arbitrator, in pursuance of the statute in such case made and provided.
between	
Charles Widder	
and	
The Buffalo and Lake	
Huron Railway Company :	

Dated this eighteenth day of April, 1864.

(Signed), W. MACLEAN,  
*Secretary.*

To CHARLES WIDDER, Esq.,  
Goderich.

That the award provides for costs, and is therefore bad.

These objections were overruled, leave being reserved to move upon them in term to enter a nonsuit.

The defendants then called about seventeen witnesses, including several eminent engineers, to speak to the propriety of the sum awarded.

They explained the character of the plaintiff's land, the difficulties and great expense in making a road and room for warehouses. Some said that the railway was no injury, but a benefit. The award was characterized by some as "exorbitant," "excessive," "unreasonable," "preposterous," "outrageous," "monstrous."

In reply the plaintiff called some eleven witnesses, most of whom had been examined before the arbitrators. Two or three were surveyors. It was shewn that the plaintiff's water frontage was 460 feet, and the chief witness said he valued it at \$50 per foot after the road &c., was made. The value was variously estimated at from \$40 to \$50 and \$60 per foot, and in the opinion of many the value was much lowered, and as some thought destroyed, by the railway works.

The evidence taken before the arbitrators was read.

The learned judge directed the jury that defendants, by appearing before the arbitrators, waived the objection as to the appointing a third before a decided disagreement; also, that Molesworth's withdrawal and declaration, after the notice of desistment, waived the defendants' right to a day's notice of the intention of the others to make an award:

That the plaintiff had the right of crossing to the water as he had it before defendants built their track, except as to their own right of user:

That if the plaintiff urged to the arbitrators that he had the exclusive use of the water, so as to get larger damages, this was a misrepresentation which might be taken in support of the eighth plea:

That on the eighth plea, if the plaintiff by improper management had the nomination of both arbitrators, it was evidence of fraud: that if the plaintiff made representations to the arbitrators which he knew were wrong, this would

afford evidence of fraud ; and if the amount awarded was so grossly out of proportion as to be unaccountable, it was evidence of fraud.

All these directions were objected to by one side or the other.

The jury found for defendants.

In Easter Term *J. H. Cameron*, Q.C., obtained a rule to shew cause why the verdict should not be set aside on the following grounds :—

*First.*—For improper conduct on the part of the defendants, as disclosed in the affidavit filed, in having provided a special train to convey the special jury in the cause over their Railway to Goderich, that they might have a view of the property which was the subject of the award on which the action was brought, and in having paid the expenses of the jury on that occasion, without the consent of the plaintiff—with costs to be paid by the defendants.

*Secondly.*—For the reception of improper evidence by the learned judge who tried the cause, in admitting evidence of the grounds on which the arbitrators made their award, against the objection made by the plaintiff.

*Thirdly.*—For misdirection of the learned judge on the first issue, in directing the jury that by that issue the extent and effect of the reference as well as the fact of the reference was put in issue, instead of the fact of the reference as alleged only.

*Fourthly.*—For misdirection of the learned judge on the fourth issue, in directing the jury that by that issue the excess of authority by the arbitrators and the extent of their authority was put in issue, instead of the fact of the execution of the award only on the matters submitted.

*Fifthly.*—For misdirection of the learned judge, in directing the jury that, subject to the right of the Railway Company to erect and run their railway, the right of the plaintiff of access to the water across the railway remained as before.

*Sixthly.*—For the admission of improper evidence, in allowing evidence to be given of the value of the property and the damages to it which had not been offered or submitted to the arbitrators.



*Seventhly.*—For misdirection of the learned judge, in directing the jury, that if the plaintiff urged to the arbitrators that he had an exclusive right to the water when he had not, it was evidence of misrepresentation under the eighth plea; also in directing the jury that there was evidence of fraud in the circumstances connected with the proceedings on the reference, and in the amount of damages awarded—whereas he should have directed the jury that evidence of actual fraud was necessary to support the plea, and that under the circumstances in evidence the large damages awarded, under the conflict of evidence, was no evidence of actual fraud.

*Eighthly.*—For misdirection of the learned judge, in having informed the jury that the chosen arbitrators should have been sworn before they appointed the third arbitrator;—and also on the ground that the verdict is against law and evidence.

In this Term *M. C. Cameron*, Q.C., and *E. B. Wood*, shewed cause, citing *Morris v. Vivian*, 10 M. & W. 137; *Snell v. Timbrell*, 1 Str. 643; *In re Cassell*, 9 B. & C. 624; *Roberts v. Eberhardt*, 3 C. B. N. S. 496; *Johnson v. Durrant*, 4 C. & P. 327; *Ravee v. Farmer*, 4 T. R. 146; *Harrison v. Creswick*, 13 C. B. 399; *Black v. Jones*, 6 Ex. 213.

*Christopher Robinson*, Q.C., supported the rule, and cited *Shipman v. Birmingham*, 5 O. S. 442; *McMartin v. Powell*, E. T. 5 Vic., R. & H. Dig. 260; *Allum v. Boulton*, 9 Ex. 738; *Bailey v. Macaulay*, 13 Q. B. 815; *Doe dem Lord Ashburnham v. Michael*, 16 Q. B. 620; *Tay. Ev.* 4th Ed. p. 303; *Daly v. The Buffalo and Lake Huron Railway Company*, 16 U. C. R. 238, 245; *Goodman v. Sayers*, 2 Jac. & W. 249, 259; *Re Elliot and The South Devon R. W. Co.*, 3 DeG. & Sm. 17.

HAGARTY, J.—Before entering on the plaintiff's objections to the verdict, it may be well to examine defendants' grounds of nonsuit, on which they had leave to move.

The first objection is, that defendants had a right to build their crib work in the river Maitland, and the arbitrators improperly considered this as part of the damage.

It was the ground of the plaintiff's whole complaint that

defendants by these works had cut off his access to the water, and if the arbitrators entered upon the question of damage at all, they could not avoid considering the effect of this work. This point would seem to be disposed of by the judgment of this court, in awarding a mandamus to defendants to enter upon the arbitration, (23 U. C. R. 215).

The second objection is that they took evidence of the cost of making crib work to make the plaintiff's property available, he having no right so to do, or to go beyond high water mark.

To this it may be answered, that when the plaintiff was complaining of an injury to his property designed for warehouses, and requiring the cutting and levelling of a steep bank, if crib work were necessary to create such value, that its cost should naturally be one of the elements of enquiry. He might or might not obtain the right to do so, and the uncertainty thereof might be a strong argument against his estimate of injury, but we cannot see it in any other light, and certainly we cannot regard it as a ground of nonsuit.

The third objection is to the sufficiency of the notice of arbitration given by defendants, for not containing the statutable requirements, and not being accompanied by a surveyor's certificate.

This objection, urged to their own notice, should certainly be examined most strictly.

The certificate of a surveyor is we think quite unnecessary when no land is taken, and when in the notice itself the defendants deny that any compensation is payable. When a railway company exercises its powers of taking land, the statute provides for a certificate that the land is required, and that the surveyor considers the compensation offered as fair. We cannot understand to what a surveyor's certificate should extend in a case like this.

The statute, Consol. Stat. C. ch. 66, sec. 11, sub-sec. 7, directs that the notice shall contain "a description of the land to be taken, or of the powers intended to be exercised with regard to any lands, describing them." The notice given by defendants thus speaks of the plaintiff's claim: "in respect of the alleged damages claimed by you for the construction of the railway along the margin of the river

Maitland, northerly of your land in the Town of Goderich, as the same is now made and built;" and formally names an arbitrator.

The particularity required by the statute was no doubt aimed at a class of cases differing widely from the present. It was a declaration of the formal steps to be taken by a Railway Company to enable them to exercise certain powers for the compulsory taking of lands or interference with existing rights. In the present case no lands were required, and defendants always contended their works have done no damage. We do not see why the notice does not sufficiently identify the subject matter of the dispute and the property alleged to be injuriously affected.

We think that the learned judge was right in holding that the defendants with their arbitrator and counsel attending before the three arbitrators waived all objections as to the appointing of the third referee before a formal disagreement. It certainly would be a waiver in the case of individuals, and we cannot see on what principle a trading corporation like the defendants, compelled to act through officers and agents, should under a statute like ours, and in such a matter as an arbitration, be entitled to any special immunity. To require their assent or dissent to or from such matters, or to their giving or accepting a notice under the statute, to be always evidenced by their corporate seal, would be tantamount to rendering it nearly impracticable to transact the business of an arbitration. Sec. 94 of the statute enacts that "All notices given by the Secretary of the Company, by order of the Directors, shall be deemed notices by the Directors and Company." No point was made that Mr. Maclean, who signs the notices as Secretary, had not the Directors' authority for his acts. The case of *Daly v. This Company* (16 U. C. R. 238) bears strongly in the plaintiff's favour on this head.

As to the objection that the award does not pursue the submission, the only variance seems to be that it particularizes the land of the plaintiff injuriously affected, giving the numbers of the lots. The notice served (which we must treat as the submission) speaks in the general terms above quoted,



wide enough certainly to cover all land of the plaintiff in Goderich injured by the construction of the railway, along the margin of the river Maitland, northerly of the plaintiff's land. The award directs compensation for the plaintiff's land "near the mouth of the navigable river Maitland, bounded by the said river on the north, and extending to the high water mark thereof, being composed of lots" (giving their numbers) "and the hill side fronting thereof," &c., in the Town of Goderich. This description seems taken from the plaintiff's deed from the Canada Company, produced by him at the arbitration. He has, as it were, by producing this deed particularized the exact property for which he claimed damage, the defendants' notice being quite wide enough to cover all his land bounded on the north by their railway as existing when their notice was given. No question was raised as to the identity of the premises, and the whole question of injury related to the river or water frontage.

We do not see that such an objection should prevail. The 19th sub-sec. of sec. 11, declares that "no award made as aforesaid shall be invalidated from any want of form or other technical objection, if the requirements of this act have been complied with, and if the award state clearly the sum awarded, and the lands or other property, right or thing for which such sum is to be the compensation," &c.

The next objection is, that the award was made without the day's notice to the defendants' arbitrator, as required by the statute. Sub-section 11, of sec. 11, enacts that "no such award shall be made or any official act be done by such majority, except at a meeting held at a time and place of which the other arbitrator has had at least one clear day's notice, or to which some meeting at which the third arbitrator was present, had been adjourned."

In this case the defendants' arbitrator expressly withdrew, and declared that he would not further act. He was expressly told that the others would proceed without him and make their award, and at the same meeting from which he withdrew the award was made.

Besides, we think that this declaration of defendants' arbitrator and their notice of desistment point strongly to

an abandonment by them of all further interest in or claim to be present at the reference. It is not however necessary to consider how it would be if another meeting had really been held at a subsequent day, and the award had been then made, without notice to the defendants' arbitrator.

We do not see clearly the force or bearing of the objection that the judge's appointment should have been made on the company's notice. The statute has no specific direction on the subject.

As to the objection that the award improperly awards costs; we see no reason for holding that (granting the want of authority to award thereon) such an excess of jurisdiction should vitiate the award, being easily separable from the rest.

We have now to consider the objections to the verdict in the plaintiff's rule.

The first point taken is the alleged improper dealing by the defendants with the jurors.

We think the plaintiff might have properly declined trying his case before such jurors as soon as he discovered what had taken place, and we accede to his argument that the proceeding was improper and irregular; and if he had proceeded to trial in ignorance thereof, we think defendants would find great difficulty in upholding a verdict so obtained.

But we feel a great difficulty in allowing the plaintiff to be now heard urging this objection, when with full knowledge of all the facts he elected to proceed with the case before that jury, and to take his chance of getting a verdict from them.

We had occasion to consider this question in *Ham v. Lasher* in this court, (a) and declined relieving a plaintiff from

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(a) Not reported. At the trial, at Kingston, in September, 1862, before *Draper, C. J. C. P.*, on the second morning of the trial the plaintiff's counsel called the attention of the court to the fact that in calling the jury a person peculiarly obnoxious to the plaintiff, and whom he was most desirous of challenging, had actually been sworn on the jury, by being called on or answering to a ballot in another name. The plaintiff however did not ask to have the jury discharged, or refuse further to proceed with the trial, but elected to go on. The verdict was against him, and in the following term he obtained a rule *nisi* for a new trial on this and other grounds, charging, in his affidavit filed, that the person objected to thus got upon the jury by collusion with the defendant. The defendant denied this, and swore that he knew nothing of the mistake until it was mentioned by the plaintiff.

The court refused to interfere on this ground, holding that if a party to a suit, aware of a fatal objection to the constitution of the jury, elect to go on

a verdict obtained against him by a jury most improperly constituted, he being aware of and stating openly to the court during the trial the nature of the objection, but allowing his case to proceed and taking his chance of a verdict. Doe dem. Lord Ashburnham v. Michael (16 Q. B. 620) was then relied on by the court.

Independently of authority, the reason of the thing would naturally suggest that a plaintiff, clearly aware of a fatal objection to a jury about to try his case, should not, after electing to take his chance of a verdict, be heard urging an objection which he was quite willing to waive had the verdict been in his favor.

The next objection to be noticed is, that the learned judge told the jury, that if the plaintiff urged to the arbitrators that he had an exclusive right to the water when he had not, it was evidence of fraud under the eighth plea.

We do not clearly see in the evidence how there was any ground for such a direction, or that in fact the plaintiff did urge such an untenable proposition to the referees. If he did make any such statement it might then be necessary to enquire whether he did so in good faith, believing what he said, or whether he did so to mislead.

It is difficult to understand how the statement in that shape could have been seriously made. He might as well have urged that he had the exclusive right to a public highway bounding his land, as to this navigable water. We think, before it would be right to tell a jury that this was evidence of fraud, it should appear with reasonable clearness that the plaintiff made the statement intentionally to mislead, and with the *malâ fide* design to induce the referees to adopt a false statement as a true one, or to prevent them from enquiring into the true nature of the alleged claim.

We think no argument used by a plaintiff on a reference to enhance his claim of damage, or to place his case in the best light, can be fairly said to come under the head of

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and take his chance of a verdict, he cannot afterwards be heard urging the objection, Doe dem. Lord Ashburnham v. Michael (16 Q. B. 620) was cited as supporting this view. The court considered that, apart from authority, the principle governing such a case was clear. A new trial was however granted upon the evidence.



fraud. It seems rather to range under the old maxim of "*Simplex commendatio non obligat.*" As suggested above, we can easily imagine a case of fraud in a party intentionally misleading referees as to a fact, with a view to prevent them from ascertaining the truth, or to accept as true what was known to be false.

We repeat we fail to see clearly the ground work of the controversy, as to any such positive statement having been made.

The learned judge reports that his charge was in favour of the plaintiff on all the issues except the eighth (charging fraud, &c.) We do not see that he has reported any express ruling as to the third and fourth objections in the rule *nisi*. The plea of no award would be construed to mean no valid award.

The second objection was given up.

As to the fifth objection in the rule, that the learned judge was in error in charging that the plaintiff's right of access to the water remained as before, subject to defendants' right to use their railway.

No doubt the plaintiff still had a right of access, as the owner of a lot through which a railway is carried has a right of access from one part of his land to the other, but the convenience of access is materially interfered with. What before was free from risk and interruption is now more or less dangerous and prevented, according to the use made of the road; and even assuming that the plaintiff would, in the absence of any other mode of access, have the right to cross the railway track, it would be a right materially different as to its exercise from that existing before the railway was constructed. Such a direction was calculated to mislead, for the jury might confound the right of access to the river with the power of exercising it.

The remaining question is that raised by the sixth ground in the rule, the admission of evidence not offered to the arbitrators of the value of the property and the damages to it.

This arises on the issue raised by the eighth plea, and the question is one of the gravest importance and difficulty, with but little in the way of authority to guide our decision.

The eighth plea is, on equitable grounds, "that the sum awarded is excessively and fraudulently exorbitant, and the award was made by the fraud, covin, and misrepresentation of the plaintiff and of the arbitrators making the same."

It is said in the books that this defence can only be raised in a Court of Equity, although it is not easy to see why it does not in substance amount to a common law plea of fraud, vitiating the instrument on which the action is brought.

We have had one case in this court, a suit of *Daly v. The present defendants* (16 U. C. R. 238). There such a plea was pleaded, and at the trial, before the late Mr. Justice Burns, witnesses were examined for the plaintiff, and plans shewn to the jury, to prove the amount awarded to be fair. One witness, an objecting arbitrator, was called for defendants. He swore the sum was outrageous. The learned judge left the issue in terms to the jury, who found for the plaintiff. No question as to admissibility of evidence seems to have been raised, and in the next term Sir *John Robinson*, C. J., said "Nothing short of actual fraud could under that plea defeat the plaintiff's action upon the award."

It is to be noted that this case was decided two or three years after the strong remarks made by the same learned judge in the case of *The Great Western Railway Co. v. Baby et al.* (12 U. C. R. 113) on the subject of exorbitant awards, on motion to set them aside.

In *Goodman v. Sayers* (2 Jac. & W. 259-260) the Master of the Rolls says "In letting in evidence of the merits I never permitted it for the purpose of shewing what the merits were; and I consider it myself only so far as it may tend to prove such a case of misconduct on the part of the arbitrators as would give this court jurisdiction. \* \* Their not calling other witnesses is nothing; for it is the business of the parties to produce their witnesses. If the parties omit it, it is no ground of imputation against the arbitrators, when a material witness has been subsequently discovered, that they did not call him. It is the plaintiff's own fault that he was not examined. How could the arbitrators know that his evidence would be material?"

We have no doubt of defendants' clear right on such an

issue to give in evidence anything to prove that the award was made by any improper practice of the plaintiff, by attempts to induce either the witnesses or the arbitrators to swerve from their duty, to exclude any class of testimony, or to exercise any improper influence over those appointed to do justice between him and his antagonists.

On this issue the award to be avoided must have been at the moment of its execution a corrupt and fraudulent exercise of the arbitrators' trust, and not the honest expression of their true opinion.

We have therefore to consider the nature of the materials before them. They had heard only the plaintiff's witnesses, the defendants declining to call any. They had not the advantage of the opinion and judgment of defendants' nominee, as he chose to withdraw from their deliberation.

We have examined the evidence adduced for the plaintiff at the reference, and must say that if the opinions of those witnesses be sound, the sum awarded cannot possibly be held exorbitant. On their estimate of the value of the plaintiff's frontage per foot, and of the injury done thereto by defendants' works, the lowest amount of damage was far in excess of the sum awarded.

Each of the arbitrators on oath disclaims all impure motive, and no attempt was made to shew any personal misconduct in the plaintiff in his dealings with either witnesses or referees, or in the referees themselves. Some of defendants' witnesses expressly disclaim any imputation of fraud, however strong may be their opinion of the extravagance of the sum awarded.

One of the defendants' chief witnesses, Molesworth, their nominee, says he can not say he saw any fraud on his co-arbitrators' part, but he "thought they were going to make their award according to the evidence, without exercising their own judgment upon it;" he also "thought the evidence of value grossly in excess of what I considered right, and I thought the others inclined to adopt such views;" therefore, he says, he withdrew.

All the materials in possession of the arbitrators, if trusted by them, would apparently shew that the value was beyond



the sum awarded. No attempt was made at the reference, or even at the trial, to impeach the veracity of any of the witnesses. The defendants pointedly refused to give the arbitrators any assistance by the aid of other testimony, of which it seems they had abundance, to form a more correct judgment.

Is there evidence, therefore, that the arbitrators when they signed the award were not expressing an honest opinion, but, on the contrary, in bad faith and with impure motive executing a fraudulently exorbitant award? In a case of this kind we should repudiate all flimsy distinctions between legal and moral fraud. There seems to be but the alternative—the award was either an honest (though possibly mistaken) opinion, or it was a corrupt exercise of a judicial power, designed to take a large sum of money improperly from the defendants for the benefit of the plaintiff.

The defendants had, it seems, the most ample means of proving what they thought to be the true nature and extent of the plaintiff's claims.

Engineers of the highest provincial reputation, inhabitants of Goderich from its early days, men of property and good repute, were forthcoming at the trial to prove how utterly mistaken were the plaintiff's witnesses, and how exaggerated was the claim for damage.

We feel the strength of this evidence, and if the court had to exercise the functions of the arbitrators in assessing the damages on the whole mass of testimony, we might very probably lean strongly against the propriety of allowing such a large sum to the plaintiff. Such would seem to be the very possible effect of the combined evidence on minds of ordinary intelligence and integrity.

But why had not the arbitrators the benefit of such testimony. Why were they left to depend solely on the opinion they might form from the plaintiff's evidence?

They had evidence before them, as they say, and as it would certainly seem on perusing it, warranting their adopting a very high view of the plaintiff's damage, and they seem to have acted upon it. If they had had the benefit of hearing the opinions of Messrs. Killaly and Shanly, and

the rest of the seventeen witnesses, whom defendants could have produced, they might have wholly modified their views.

The evidence of Mr. Prince is noteworthy on this head: "I had no motive to make an improper award. \* \* \* I had no doubt I did right as it stood then, but from what I have heard since I am shaken in my opinion."

This was said at the trial, after hearing all the defendants' evidence. The speaker of these words might naturally complain that he was hardly dealt with, in being charged with fraud and collusion in making his award, by those who refused to give his judgment the benefit of such testimony as they readily could have produced, and left him to decide solely on the evidence adduced by the plaintiff.

The defendants produce this strong testimony at the trial, with a view of satisfying the jury that the award must be fraudulently exorbitant. They desire to demonstrate the conduct of the arbitrators by the light thus retrospectively cast upon it by the new evidence.

We feel great difficulty in acceding to defendants' view of the law.

They have full opportunity of laying their whole defence before the three arbitrators. They have ample evidence, if they will only produce it. On due deliberation they decide on attempting to break up the reference, withdraw their referee, and refuse to give any evidence. They elect, as it were, to risk all on an attempt to prevent the making of an award.

In general such a proceeding cannot be safely adopted. A defendant in a trial at *Nisi Prius*, when a plaintiff's case is made out to a certain extent on evidence, elects at his peril to abstain from offering evidence which he has it in his power to produce. If he leave the court, relying on some legal objection to the right to recover, he is generally held to his objection, and stands or falls by it.

If a jury returns a very large verdict for damages, warranted by evidence given by the plaintiff, a defendant who has had ample evidence to give for the defence, but designedly withholds and suppresses it, will not generally be successful in obtaining a new trial on a hundred affidavits

that the damages were excessive and outrageous. He will always be met by the enquiry, why was not this testimony produced at the trial?

The ground of the court's interference to relieve against excessive damages is generally considered to be that the amount recovered is so large, and so unwarranted on the evidence, as to raise the strong presumption that the jury were actuated by improper motives, beyond the true merits of the case as disclosed at the trial,—amounting in fact to misconduct.

Where the evidence warranted the verdict, the defendant generally seeks to impeach the truthfulness of the plaintiff's witnesses. In the case before us there is no such attempt. Everything is rested on the force of the testimony for the first time produced at the trial.

It was suggested, that whatever the plaintiff's witnesses swore, the arbitrators' own judgment, on viewing the ground, should have prevented their adopting the witnesses' estimate.

It is very difficult to find any express authority on this point, either in the text books or the reports.

Many cases arise where the arbitrators have no personal knowledge whatever of the subject matter of the reference, and have to be guided wholly by the testimony. Three men may be appointed to value damages done to land which they have never seen. Each party is invited to produce proof of his case. A plaintiff proves, by a dozen people, that the damage done is £1,000. The defendant declines producing evidence. The arbitrators award £1,000. It would seem to be a most singular state of the law, if their award could be successfully impeached as fraudulent and corrupt, merely because twice the number of people, of whose evidence they never heard, afterwards swear that such a sum was preposterous and exorbitant.

Mr. Russell, in his treatise on Awards, 3rd Ed. p. 199, says: "The cases are numerous to shew that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers. \* \* So where it



was objected that the arbitrator had not exercised his own judgment respecting the valuation of some timber, *Lord Alvanley*, Master of the Rolls, said: 'That alone is not sufficient to prove the award bad, for a man may make use of the judgment of another upon whom he may depend, and the valuation of that person is his, if he choose to adopt it.'—*Emery v. Wase*, (5 Ves. 846); and *Lord Eldon* confirmed this view on appeal, (8 Ves. 504 a).

The subject is somewhat discussed by *Lord Cranworth*, in *Eads v. Williams* (24 L. T. Rep. 162, 1 Jur. N. S. 193). He held that where a matter was referred to a surveyor, a person of skill, to value, the referees must not necessarily examine witnesses, if they *bonâ fide* act as knowing sufficiently of the subject to decide properly without witnesses. In *Johnston v. Cheape* (5 Dow H. L. Cas. 264), *Lord Eldon* says: "Then it is insisted that the arbitrator acted with a partiality that indicated corruption. That however depends on the view which he took of his duty; for an arbitrator is not bound, in all cases, to receive evidence, whether it will have any effect on his mind or not. \* \* \* But he saw all the evidence and all the inferences arising out of the circumstances, and he seems to have proceeded on this ground,—'taking all these matters to be facts, yet having my own local knowledge to guide me, and all the other circumstances in my view, I cannot adopt your conclusion.'" In *The Caledonia Railway Company v. Lockhart* (6 Jur. N. S. 1314, 3 L. T. Rep. N. S. 65), *Lord Wensleydale* says: "An arbitrator is not bound to examine witnesses \* \* \* By the Lands Clauses Act he may, but is not bound to, examine the parties and their witnesses on oath. Nor is he prevented from consulting men of science in every department, where it becomes necessary."

It was pressed upon us by the plaintiff's counsel, that nothing short of actual fraud would support this plea. Language authorizing such an argument is to be found in the case cited from our own reports in this court, *Daly v. These Defendants* (16 U. C. R. 245.)

We do not, in the view we are disposed to take of the case before us, necessarily adopt or reject that language. A case might arise, and in practice has no doubt actually

arisen, where the arbitrators heard both sides, and still awarded a sum which a dispassionate consideration of the whole evidence before them would lead men to believe was fraudulently exorbitant, and to be accounted for in no way but on the presumption of improper motives in the referees.

The position in such a case would be, that the arbitrators, on the materials before them, when they made their award must have acted improperly and in bad faith: that either the plaintiff's testimony was of that nature that reasonable men ought not to have believed or at all events not acted on it, or that the testimony adduced by defendants was so overwhelmingly the other way that reasonable men must have been governed by it if acting in good faith. If such a case arise, it will be necessary perhaps then to determine if further evidence be or be not admissible.

If in the case before us any evidence could have been or had been adduced at the trial to shew that the arbitrators themselves did not really believe the plaintiff's witnesses, it would have gone far to prove the bad faith of the award, and that against their own judgment the arbitrators improperly adopted opinions which they considered untrustworthy. Or, it having been proved that the arbitrators viewed the premises, it might be urged to the jury whether as reasonable men they could have honestly awarded as they did.

The jury, by finding for the defendants, of course adopted the opinions of their numerous witnesses, and pronounced the sum awarded to be fraudulently exorbitant. The only logical reason for such a conclusion must have been that the arbitrators either did not believe the witnesses of the plaintiff, or as rational men ought not to have believed them.

But the jury formed this opinion certainly on the evidence then for the first time adduced by defendants. It can hardly be supposed that a jury knowing nothing personally of the subject matter would have found this verdict merely on hearing repeated to them the same evidence heard by the arbitrators. If this be conceded, it is difficult then to see how any legal proof was given to support a plea charging fraud and bad faith at the time of making the award on the

part of those from whom the light of the new testimony was designedly withheld.

We think that the defendants, having elected to leave the case to the decision of the referees on the evidence furnished by the plaintiff, having at the time ample means of refuting his witnesses, ought not to be allowed to fasten a charge of fraud on the arbitrators before another tribunal on the strength of evidence then produced for the first time.

It is to be feared that at the trial the question substantially considered by the jury was whether, after hearing all the testimony, the sum of \$10,000 was or was not an extravagant sum to be paid by defendants to the plaintiff for the alleged injury to his land. Viewed in that broad light it would be impossible to say that the verdict was not well supported by the evidence.

But the true issue to be tried was of a totally different character. It was whether the award, made as this award was in fact made, was the honest opinion of the referees on the case before them, or a fraudulent judgment resulting from impure motives.

We therefore are of opinion that, under the circumstances of the case, the defendants should not have been allowed to go into evidence of value which they might have given but did not give on the arbitration, and that the learned judge should have rejected the testimony.

We think there should be a new trial without costs.

DRAPER, C. J.—I concur in the judgment just delivered. I desire however to add, that although the statute sanctions such a course, it appears to me not desirable that the company's arbitrator should be one of their own officers, and especially one who not improbably was consulted upon the very matter on which as an arbitrator he was called upon to adjudicate. It is too generally the case that an arbitrator considers himself the advocate of the party who names him, and it is likely to materially affect the independent judgment of an arbitrator when he is in the service of one of the parties. Partiality in such a case is at least to be apprehended.



I think an arbitrator should bring to the consideration of a case the same impartiality and desire to attain truth that is expected, and rightfully expected, from a judge, not the feelings of an advocate who exerts himself diligently for the interests of one side and adversely to those of the other. It is or should be his leading principle to be impartial, as much as to be free from corruption. Confidence would soon be lost in the public tribunals if the character or conduct of the judges exposed them to the suspicion of partiality to either party in a cause before them, and there would be less satisfaction in references if it were felt that arbitrators were at liberty to be partizans. I make this observation because I think some of the difficulty that we have seen in this case has arisen from the selection by the defendants of one of their own officers to be their arbitrator, though, as I have already said, it is permitted by the statute.

MORRISON, J.—I concur generally in the judgments just given, but I have not been able without much hesitation to bring myself to the conclusion that the evidence of value on the part of the defendants was inadmissible.

Rule absolute.

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### BATES V. THE GREAT WESTERN RAILWAY COMPANY.

#### *Common carriers—Special conditions.*

Action against defendants as common carriers for delay in carrying goods.

—*Plea*, setting up special conditions, on which the goods were received, exempting defendants from liability, *Held* good on demurrer.

Remarks as to the necessity and justice of legislative redress in such cases.

THE declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died

on the journey, and that by the unreasonable delay in the carriage and delivery of the others the plaintiff lost a market, &c.

*Plea*, that the said oxen and cows in the declaration mentioned were delivered by the plaintiff to and accepted and received by the defendants to be carried and conveyed under a special contract, and subject to the following conditions:—

That the plaintiff undertook all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise, whether arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants or their servants; and that they, the defendants, did not undertake to forward the animals by any particular train, or at any specified hour, neither were the defendants responsible for the delivery of the animals within any certain time, or for any particular market.

And the defendants further say, that the loss and injury sustained by the plaintiff in respect of the said oxen and cows in the declaration mentioned, as well by the keeping and retaining of the same at the said Ingersoll station as by the delay in the conveying and delivery thereof, were a loss and injury within the true intent and meaning of the said conditions, and was and is part of the loss or damage so agreed to be borne by the plaintiff as aforesaid, and not any other loss or damage.

The plaintiff took issue on so much of the plea as relates to the said two cattle alleged in the declaration to have died in consequence of the negligence of the defendants. And as to the residue, he demurred, on the ground that the plea does not answer the breach of duty alleged—namely, unreasonable delay in carrying; and notwithstanding anything in said contract the defendants would be bound to carry within a reasonable time.

*S. Richards*, Q.C., for the demurrer.

*M. C. Cameron*, Q.C., contra, cited *White v. The Great Western R. W. Co.*, 2 C. B. N. S. 7; *Latham v. Rutley*, 2 B. & C. 20; *Hamilton v. The Grand Trunk R. W. Co.*, 23 U. C. R. 600.

DRAPER, C. J. delivered the judgment of the court.

In the existing state of our law we are of opinion the plea demurred to is good. The declaration is framed upon the common law liability of the defendants as common carriers, and the plea sets up that they did not receive the cattle under such liability, but under a special contract which is set out. It is too late to argue that the parties could not lawfully enter into such a contract. Having entered into it their rights and liabilities are to be ascertained by its terms, and not by the common law. We have no such enactment as the 17 & 18 Vic. ch. 31, sec. 7, which submits the question whether the conditions imposed by the Railway Company are reasonable or otherwise to the decision of the court or judge before whom any question relative thereto shall be tried.

This case as well as that of *Hamilton v. The Grand Trunk Railway Company* (23 U. C. R. 600) illustrates the necessity and justice of legislative redress. The recent case of *Allday v. The Great Western Railway Company* (11 Jur. N. S. 12) shews the value of the English act. The court in that case held that a condition limiting the defendants' responsibility, very analogous to the present case, was unreasonable, and gave judgment for the plaintiff on the face of it.

But in the absence of any such authority we must decide in the defendants' favour on this demurrer.

Judgment for defendants on demurrer.

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## GUSTAVUS DUNDAS V. JOHN JOHNSTON AND JOHN WILSON.

*Ejectment—Title by possession—Possession of part only—Effect of—  
Competency of witness—New trial refused.*

Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot.

It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion; and *Held*, that in this case there was evidence legally sufficient to warrant such inference.

*Seemle*, that a "squatter" will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

A. being sued in ejectment, suffered judgment by default for want of appearance, and B. was admitted to defend as landlord. *Held*, that A. was not a competent witness, but that, as the verdict was warranted by the other testimony, his reception was no ground for interference.

EJECTMENT for the east half of lot number ten, in the tenth concession of North Monaghan. The writ was addressed only to the defendant Johnston. Wilson was admitted to defend as landlord by a judge's order, and appeared for the whole. Johnston entered no appearance, "whereupon the said Gustavus Dundas ought to recover against him."

The trial took place at Peterborough, in May last, before *Adam Wilson, J.*

It appeared that a patent from the Crown, dated the 28th of November, 1833, issued granting the premises in fee to the plaintiff. He also proved the execution of a deed, dated the 1st of February, 1860, from himself to one Edward Chamberlain, of the premises, for an expressed consideration of £150. A witness swore that about forty years ago the plaintiff, who represented himself to be a discharged soldier, offered to sell him his right to 100 acres of land, and that the witness accepted the offer, and let the plaintiff have a heifer for it, and got a writing from the plaintiff, which in moving house many years ago he lost. He said the meaning of the writing was to secure the witness a right to the land which the plaintiff was entitled to get from the Government. The plaintiff also gave him the location ticket for the

100 acres, being No. 10, in the 10th concession of Monaghan, now North Monaghan. About two years afterwards defendant Wilson bought this right from the witness. The location was subject to settlement duties, and Wilson performed them. The Crown patent was taken out, and the witness believed that Wilson brought it to him to keep until he (Wilson) should pay the witness what he had agreed to pay. He made the payment, and the witness gave up the patent to Wilson.

It was proved that Wilson had a house on the 100 acres adjoining these premises, and cleared from 20 to 30 acres of the premises, a considerable portion of the 100 acres being drowned land, which apparently could not be cultivated.

About the year 1835 the plaintiff asked another of the witnesses for the defence if he knew the lot on which Wilson was living, and said that he had sold that lot. The evidence shewed that Wilson had by himself or his tenants used the cleared land ever since; the uncleared portion had never been fenced in. Evidence was given that the taxes according to the former Treasurer's books had been paid, and the present Treasurer proved that defendant Wilson had paid them in 1846, or for some years afterwards.

The defendant also called John Johnston as a witness, who was objected to, as being the defendant named in the writ of summons. It was answered that he had not appeared to defend, and that judgment was signed against him. The learned judge received his testimony. The most material statement he made was, that the plaintiff, who lived within two miles of these premises, told him that he owned these hundred acres at one time and had sold them.

The learned judge left to the jury whether the plaintiff had knowledge of Wilson being in possession of this land for a period of twenty years or more before action brought, stating that the possession of a part of the 100 acres might import possession of the whole, depending upon circumstances: that Wilson took possession as a purchaser of the whole, according to the evidence, which also shewed that nearly all of the 100 acres which remained uncleared was swampy and

not very fit for profitable cultivation, and that the taxes for the whole had been paid.

Exception was taken to that portion of the charge relative to possession of part affording evidence of possession of the whole. The jury found for the defendant.

In Easter Term *C. S. Patterson* obtained a rule, calling on the defendant to shew cause why there should not be a new trial, on the ground of the improper reception of the evidence of Johnston, and for misdirection, in ruling that the evidence of the defendant's possession was sufficient without shewing that such possession was continuous, and in ruling that "there was sufficient evidence of the possession of the wild land which the defendant did not occupy;" and on the law and evidence, the possession on which the defendant relied not having been proved. He cited *Tay. Ev.* 4th ed. sec. 1662.

*S. Richards*, Q.C., shewed cause during this term, and cited *Doe dem. Lord Teynham v. Tyler*, 6 Bing. 561; *Hughes v. Hughes*, 15 M. & W. 701; *La Frombois v. Jackson*, 8 Cowen, 589; *Calk v. Lynu's Heirs*, 1 Marshall, 346; *Jackson dem. Hasbrouck v. Vermilyea*, 6 Cowen, 678; *Farley v. Lenox*, 8 Serg. & Rawle, 392; *Hunter v. Farr*, 23 U. C. R. 324.

DRAPER, C. J., delivered the judgment of the court.

The question of title by possession without paper title as against a paper title, often presents peculiar features in this country, and is not always a matter of easy solution. Land is generally divided by the Government surveyors into uniform lots in each township, except where the irregular formation of the ground, owing to lake or river frontage or other causes, renders this impossible, and then there are broken lots. The grants from the Crown are also very frequently for less than the lots as surveyed, sometimes, as in the present case, for a half lot, sometimes for a quarter lot, and sometimes a certain number of acres, part of a lot, is granted. As a rule these grants are of land in the natural state, not cleared or improved; at least such is generally



the assumed condition when the Crown first agrees to dispose of it to individuals. Even where the grants were preceded by mere locations, subject to the performance of settlement duties, it is notorious that these duties were oftentimes not made at all or made in a very perfunctory manner, and no part of the land was in fact either cleared, fenced or settled upon, and notwithstanding the previous condition to perform such duties the grantee had not, in the language of the 3rd section of Consol. Stat. U. C. ch. 88, "taken actual possession by residing upon or cultivating some portion thereof."

When therefore a person without any title, or without any real or *bonâ fide* claim of title, (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrong doer can be deemed to have taken and to be in possession of the whole of such lot,—for example, of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division by the original survey; or that his cultivation and fencing of a small part puts him into possession of as much (be it the whole or the fractional part of a lot) as the proprietor of the part trespassed upon owns. In cases of what is well understood in the country by the term "Squatters," I have always thought, that as against the real owner they acquire title by twenty years occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

We agree with the learned judge who tried this cause, that it must depend upon the circumstances of each case whether the jury may not, as against the person having the legal title, properly infer the possession of the whole land covered by such title in favour of an actual occupant, though his occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion less than the whole. And we think evidence such as was given in this case must be submitted to the jury as legally sufficient

to warrant such an inference; and no question upon the evidence, beyond the true character and nature of the possession in point of extent, has been raised.

Upon the question of the competency of the defendant Johnston we are not able to concur in the ruling at the trial. He is tenant in possession of the premises under Wilson, who as landlord is admitted to defend. As such tenant he comes within section 5, of the Evidence Act, (Consol. Stat. U. C. ch. 32,) which provides that the previous enactment, that interest shall not disqualify, shall not render competent or authorize or permit "any claimant or tenant of premises sought to be recovered in ejectment" to be called as a witness. His not appearing to defend does not make him the less a tenant of the premises, having a direct interest to prevent a change of possession, and not rendered competent by the act to support that interest by his testimony. But we are of opinion that without his testimony the verdict ought to have been as it was, and we are glad to find in the case of *Doe v. Tyler*, (6 Bing. 561,) which is recognised in *Hughes v. Hughes*, (15 M. & W. 701,) an authority for upholding the verdict.

We are of opinion, this rule should be discharged.

Rule discharged.

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## LETT V. THE COMMERCIAL BANK OF CANADA.

*Married Women's Act, C. S. U. C. ch. 73—Construction of—Property purchased after marriage out of the wife's separate estate.*

In an interpleader issue the plaintiff, a married woman, claimed goods seized under an execution against her husband. It appeared that the property consisted of stock, farming implements, and growing crops, and was seized upon a farm on which she and her husband were living, and which had been devised by the plaintiff's father to trustees for her benefit, the rents to be payable to her for her separate use; and that most of it, except the crops, had been purchased by the husband at sales, but paid for by the claimant out of the rents of other lands devised in the same manner. She had been married before the 4th of May, 1859, without any settlement.

*Held*, in the absence of any evidence to the contrary, that the reasonable presumption was that the husband was tenant of the land, and if so the crops would be his.

2. As to the other property, that, apart from our statute, it would not be the claimant's merely because it had been purchased by money which belonged to her under the will.
3. That as to the statute, it should be construed as creating a settlement before marriage in the terms of the first and second sections; and if in this case the property was bought by the wife to enable her husband to carry on the farm for his own benefit and that of his wife and family, it would be liable to satisfy his debts.

In the County Court it was left to the jury to say whether the property claimed did not belong to the husband, he having reduced it into possession. *Held*, that this was an insufficient direction, and that their attention should have been drawn more explicitly to the effect of the statute, to the presumption arising from the husband being the head of the family, occupying and farming the land, to the use to which the property was put, and to the wife's apparent object in purchasing it.

*Quære*, if this had been trespass instead of an interpleader, whether the wife could have sued alone.

APPEAL from the County Court of the County of Oxford.

This was an interpleader issue, ordered in June, 1864, to try whether certain goods, cattle and growing crops, which were taken in execution by the sheriff of Oxford on the 18th of May, 1864, under a *fi. fa.* tested 30th of April, 1864, in an action of the Commercial Bank against Stephen Lett and Jacob S. Shoemaker, were the property of the claimant, Fanny L. Lett, as against the Commercial Bank.

It appeared in evidence, that this property was seized by the sheriff upon lot number one in the tenth concession, and lot number one in the ninth concession of Blenheim. The Rev. Dr. Lett, one of the execution defendants, was living with his wife, the claimant, upon these premises. A witness stated that Dr. Lett was the managing farmer. The land



had belonged to the claimant's father, together with a much larger quantity in the township of Blenheim. Most of the property seized (excepting the growing crops,) appeared to have been paid for by the claimant out of the rents and profits of her father's real estate. Many of the things were purchased by Dr. Lett at sales, and the claimant gave her drafts or orders upon her tenants in payment. Dr. Lett's son Stephen swore that none of the property seized by the sheriff belonged to his father.

The claimant was married to Dr. Lett seven or eight years before the trial, and therefore before the 4th of May, 1859. The will of Joseph B. Spragge, the father of the claimant, was put in as part of the claimant's case, the execution of it being admitted by the defendants.

It bore date the 1st of October, 1853. By it he devised all his personal property absolutely to his daughter Eliza Frances, subject to the payment of his debts and his funeral and testamentary expenses. And he devised all his lands in Blenheim in fee to trustees, for the use of his said daughter, to whom he made the rents and profits of such lands payable by his trustees, for her own sole and separate use and benefit, exclusive of any husband; but she was by no means to be chargeable for or in any way of impeachment for waste. Power was given to the trustees to make leases for terms not to exceed twenty-one years, by the daughter's consent in writing during her life, and after her death, during the continuance of the trust, by their own authority, reserving the best or most approved yearly rents, and taking a covenant from the lessee to pay the rent, and requiring him to execute a counterpart with a condition for re-entry on non-payment, and no exemption to be given to the lessee from punishment for committing waste.

The evidence, all of which was given on the claimant's case, almost conclusively shewed that all the chattels in question were acquired after the death of the father of the claimant, and after her marriage with Dr. Lett; and it was submitted to the jury to find whether the property claimed, or any part of it, belonged to her husband, he having reduced it into possession.

The jury gave a general verdict for the claimant.

A rule *nisi* to enter a verdict for the defendants, or for a new trial, was granted. The following objections were taken: 1. That there was no evidence that the legal property in the goods in question was not, at the time of the seizure, in the trustees under the will: that the claimant's interest was only equitable, not cognizable in a court of law; and that the claimant did not shew such an actual and exclusive possession as would enable her to maintain an action at law in relation to these goods. 2. That it was not shewn the plaintiff married on or before the 4th of May, 1859, without any marriage settlement, nor that the goods had been acquired before that date, nor was anything shewn to bring the goods within the protection of the Consol. Stat. U. C. ch. 73. 3. That as to certain of the goods (including the crops in the ground,) there was no sufficient evidence to support the claim. 4. No probate of the will was produced, and therefore there was no proof of title to the personal property. 5. The original will was improperly admitted as evidence, to prove the claimant's title to personal property.

After argument this rule was discharged, and the defendants appealed, contending that a new trial ought to have been granted.

*Robert A. Harrison* and *Thomas Miller* for the appellants, cited *Scouler v. Scouler*, 8 C. P. 1, 19 U. C. R. 106; *Kraemer v. Gless*, 10 C. P. 470; *Vanevery v. Ross*, 11 C. P. 133; *Isaac v. Spilsbury*, 10 Bing. 3; *Wallis v. Burton*, 5 Grant 352; *Carne v. Brice*, 7 M. & W. 183; *Rex v. French*, Russ. & Ry. C. C. 491.

*S. Richards*, Q. C., contra, cited *Shingler v. Holt*, 7 H. & N. 65; *Edwards v. English*, 7 E. & B. 565; *Bird v. Crabb*, 4 L. T. Rep. N. S. 368.

DRAPER, C. J.—The claimant does not assert that the goods claimed came to her under her father's will. On the contrary, most of the evidence produced by her proves the reverse; for as to the cattle, &c., they appear to have been purchased since her marriage, and since her father's death,

and the growing crops must have been put into the ground long after both these events.

As to the growing crops, the case appears to be that the claimant and her husband were living together on land devised by her father to trustees for her use. The will, while silent as to her occupation of the land or of any portion of it, makes express provision for the trustees granting leases at the best rent, and gives directions as to certain things which are to be required from the tenants, and makes it the duty of the trustees to pay over the rents, issues and profits to the claimant or her appointee. The occupation of the land may not be necessarily inconsistent with the testator's intention; but he certainly has made no express provision for it. In the absence of any evidence to the contrary, it seems to me the reasonable presumption is that Dr. Lett was tenant of the land on which these crops were growing; and the evidence of a neighbour, one of the claimant's witnesses, gives colour to this presumption, when he says, "Dr. Lett is the managing farmer, as far as I know." If he is in fact the occupant farming the land, the growing crops were his, and were liable to an execution against him.

There was a good deal of argument on the construction of the statute. I think it may be said to operate by making a marriage settlement for every woman who, having property of her own, has married since the 4th of May, 1859, without having any marriage contract or settlement; and also for every woman who on or before that same day, having property of her own, married without such contract or settlement.

It leaves all marriage contracts or settlements made by the parties to their own operation; but if there be none, then, as to every such woman married on or before the 4th of May, 1859, it provides that she may from and after that day hold her real estate not on that day taken possession of by the husband by himself or his tenants, "and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th of May, 1859,



and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried."

The evidence shews the claimant to have married before the 4th of May, 1859, and there is no suggestion that there was either marriage contract or settlement; and if the growing crops are hers, they were acquired by her after marriage. Whether hers or her husband's depends on which of them was the occupant in fact and law of the premises on which they grew; and that is a question which has not been submitted to the jury.

As regards the property other than growing crops, it consisted of horses, cattle, sheep, waggons, sleighs, harness, and farming implements. It was all on the farm on which Dr. and Mrs. Lett lived, and all apparently suitable for carrying on farming.

The larger portion thereof was paid for by the plaintiff, by or through orders which she gave on the tenants of the lands devised to her trustees. Part was purchased by Dr. Lett at sales which he attended; some part it was stated she bargained for. It was not distinctly shewn that all things were paid for, but there was no evidence of any payments excepting such as came out of these rents, and were made by the plaintiff's consent or authority. We may assume that the trustees sanctioned her directly receiving the rents, though they alone have power to lease.

There are several cases in the English books which throw light upon the questions arising here. In *Haslington v. Gill* (3 Dougl. 415) there was a settlement before marriage of a large number of cows (the property of the woman), and of the increase and proceeds thereof, to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cow-keeper for her sole benefit. After the marriage the wife out of the profits of this business purchased more cows. It was held that all the cows were protected by this settlement from the husband's creditors. Lord Mansfield's observations are to be well considered, where he alludes to the fraudulent use which such a settlement might be put to: "There might indeed have been

circumstances evidencing the fraud, as if the husband had himself carried on the trade, and kept the cows, and in doing so had contracted debts."

Jarman v. Woolloton (3 T. R. 618) is similar in principle. There a settlement was made to trustees of goods before marriage, to enable the wife to continue to carry on a separate trade, and she did so at first in a separate tenement, the husband carrying on another business, but finally all was transacted on the same premises; and it was held that it became a question for the jury whether the trade was carried on solely by the wife, or by her and the husband jointly: if the latter, the goods would be liable to the husband's debts.

In Carne v. Brice (7 M. & W. 183) it was held that the property in wearing apparel, bought for her own use by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of her marriage settlement, vests by law in the husband, and is liable to be taken in execution for his debts; and the same doctrine is maintained in Tugman v. Hopkins (4 M. & G. 389).

I refer also to Bird v. Peagram (13 C. B. 639) as collecting most of the authorities on this subject, and as completely answering a suggestion made during the trial and in the argument, that the property purchased by Mrs. Lett out of the moneys she received as cestui que trust, became also trust property, the legal right to which was in the trustees, and an equitable interest only in the plaintiff. The moment she received any of the rents they became hers absolutely, and as to them the object of the trust was attained, and consequently the trust was so far at an end.

On the receipt of such money it was at her absolute disposal. Whether in the disposition of it she gave her husband any rights over it, or over that in the purchase of which it was expended, is the question for decision.

It appears to me to have been too much assumed that whatever was purchased by her or paid for by her out of that money, became as absolutely her own as as if it had been part of the trust estate. Such an assumption is not

warranted by the authorities I have above referred to, and as it can only be rested upon the supposed effect of the statute, it becomes necessary to enquire whether this is a correct deduction from its provisions.

The act, as I have already stated, is in my humble judgment to be construed as creating a marriage settlement, in the terms of the first or second sections, in all cases to which those sections respectively apply, and such settlement is to be dealt with as one made by a proper conveyance to trustees, before marriage, for the use of the intended wife.

Notwithstanding the broad language used in the act as to property acquired by the wife "in any way after marriage," the legislature have (Sec. 5) declared she is not entitled to her earnings during coverture without an order for protection. This provision is a recognition of one of the common law rights of the husband as not intended to be annulled, though a wife's earnings might well come within the words property acquired in any way after her marriage.

Now, although there are other provisions besides those in secs. 1 and 2 which affect the husband, no one of them except sec. 6 further diminish or take away his common law rights over his wife's real or personal property; and sec. 6 only gives the wife a right to an order for protection in certain cases of misconduct on the husband's part, or where she has a decree for alimony against him. If therefore I correctly interpret the statute to operate as a general marriage settlement, where there is no other between the parties, the cases to which I have referred upon marriage settlements will apply.

In this case, then, husband and wife are living together, the wife having a settlement of real property, the title to which is vested in trustees. As to this property no question is raised, the interpleader relating solely to property acquired after marriage. They live on a farm, the title to which is in the trustees, being part of the estate devised for the wife's benefit. The terms on which they occupy are not shewn, but I apprehend in a court of law we must treat the husband as the tenant, be it at sufferance, at will, or for a term of years. If there is no agreement or lease under which he



holds, I do not see why he would not be liable to the trustees for use and occupation, as holding with their assent. The evidence shews the farm is worked by the husband, and without any evidence he is to be deemed the head of the establishment, having the rights and subject to the liabilities of the master of the family. The purchases of the property in question were made, and the payments by the wife, in the manner already stated. They were taken to this farm and were used and employed upon it. There is no antenuptial contract, as there was in *Haslington v. Gill*, that the wife may carry on any separate trade or business for her own use. The moment she got the rents she could dispose of them as she pleased, giving them or any part of them to her husband, or making purchases with them for his use, or paying his debts with them.

If in the present case she bought the different things to enable the husband to carry on the farm for his own benefit, and that of his wife and family, they are in my opinion liable to satisfy his debts. Suppose she bought a stock of goods, and gave them to him to carry on business as a merchant, buying and selling in his own name, can there be any doubt that such goods would be liable for the satisfaction of his debts? A similar case is put by Lord Mansfield in the case in *Douglas*, as affording evidence of fraud, which, as he observes, will vitiate anything. It is true in that case there was a settlement by contract; but here there is one created by the statute. I cannot permit a surmise even that the act was intended to create a protection for the husband's dealings which will operate as a fraud on the husband's creditors, nor do I find that the language compels a construction which would have this effect. I am not inclined to hold that because the wife has separate estate, we are to treat the husband as her agent, clerk, or farm bailiff, having the interest of a servant or employee; nor that he can cover dealings from which his whole family derive a direct benefit, under the cloak that his wife furnishes all the money, and that he is a mere dependent on her bounty, and owns none of the property which he or those working on the place use in its cultivation, and to derive profit from it.

I think the evidence preponderates against the verdict, but that it is a question for a jury. In leaving to the jury to determine whether the property did not belong to the husband, "he having reduced it to possession," I think there was a want of sufficient direction, and that their attention should have been drawn more especially to the effect of the statute, to the presumption arising from the husband being the head of the family and in occupation of the land, farming it, as far as the evidence went, to the use to which the property purchased was put, and the apparent object of the plaintiff in paying for such purchases.

I agree that there could not properly have been a nonsuit ordered, but am of opinion that the rule should have been made absolute for a new trial. We should therefore allow the appeal, and direct that the court below, instead of wholly discharging, should make absolute the rule for a new trial, costs to abide the event.

The present case being an interpleader under the order of the County Court, acquiesced in and acted upon by all parties, and being in the nature of a feigned issue, no difficulty is created by the fact that the plaintiff is a feme covert, and is suing in a court of law without joining her husband. If this had been a common action of trespass we must have considered whether the 18th section of the statute applies to actions respecting those rights, property and estates which by the first and second sections of the act she is to have, hold and enjoy, "in as full and ample a manner as if she were sole and unmarried, any law, usage or custom to the contrary notwithstanding."

HAGARTY, J.—I concur in the judgment of the learned Chief Justice. I think it seems to have been too readily assumed in the court below, that as the purchase money of the chattel property was of the separate estate of the wife, the chattels themselves, as a matter of course, stand under the same ownership as the money. I cannot accept this proposition as universally true; it would involve very serious and inconvenient results.

Under the second clause of the statute she is allowed to

have and enjoy her personal property, in this case being moneys arising from the rents and profits of certain real estate, as fully as if she were a feme sole. These moneys could not be seized for her husband's debts; he could not give them away, &c., without her consent.

According to the evidence, the husband, the ostensible farmer of his wife's land, on which he and she lived, attends a sale and buys (say) an ox. Let us suppose that he is allowed to take it away, on an understanding to bring back the purchase money next day. He comes back next day and pays the price, with money obtained from his wife. I am not at all prepared to assert that as soon as it is shewn that the ox was paid for out of the wife's money, it must necessarily be considered to be her property. She may choose to give money to her husband to enable him to carry on farming for his own or their joint benefit. In such case the articles bought by him with such money would, I think, belong to himself. If he purchase property and then get money from his wife to pay for it, it is not (on that account merely) the less his own property.

It can hardly be believed that the legislature intended that a large amount of rents received by a married woman from her separate estate should be employed in buying a stock of goods with which the husband might open a shop, contract debts with various persons, and that neither the goods nor the moneys received from their sale could be touched by his creditors. The same remark might apply to farming on a large scale, stock-breeding, &c.

It seems to me that the natural presumption in cases like the present would always be, and jurors would do well to act on it, that wherever chattel property like farming stock or implements, &c., are found in the visible use and disposition of a man, and it was shewn that they had been bought or paid for with his wife's money, then, as to so much of her money, that it had been "controlled and disposed of" by the husband with the wife's consent, and the property which it had paid for had passed from the protection of the statute into the honest rule of the common law.

If a trespass were committed on any of the property by a



stranger, I presume the husband would be a party to the suit. To whom would the damages belong? If the husband himself carry off the property, can the wife maintain replevin for them as plaintiff against her husband? In fact the possible difficulties to arise are innumerable.

We never can sufficiently appreciate the broad wisdom and justice of the common law until we come to apply the provisions of a statute like this to the realities of every day life, and the adverse rights of debtor and creditor.

I cannot but see great difficulty in enunciating a certain principle to govern all cases of this nature. It is urged with great force that a married woman cannot "have, hold, and enjoy," her personal property "in as full and ample a manner as if she were sole and unmarried," if she may not buy what she pleases with her own money, and have flocks and herds and ships and warehouses of her own, as a single woman might. We have however to look at the entire statute, and cannot wholly ignore the rights of the husband, where the express words of the act do not nullify such rights.

She may be permitted to give away the moneys forming her separate estate to any person; or to invest them in securities, and dispose of them and the accumulations as she may please. She may apply it to the support of herself and her husband and family, and in many other ways enjoy the substantial benefits of the statute.

But if the court be correct in holding that growing crops raised by the husband on his wife's land, on which they both reside, are his property, not hers, I find a difficulty in distinguishing between them and the farm stock, implements of husbandry, &c., which he is shewn to have been the active party in purchasing, or in holding that they are not equally his, although paid for by his wife's assent out of her separate moneys.

I think the appeal must be allowed, and a new trial be ordered, without costs.

MORRISON, J., concurred.

Appeal allowed.

THE ONTARIO BANK V. WILLIAM MUIRHEAD, JAMES M.  
KERBY, JAMES HAMILTON, AND SAMUEL OVERFIELD.

AND

THE ONTARIO BANK V. JAMES M. KERBY AND JAMES  
HAMILTON.

*Writs against goods and lands—Right to issue concurrently—Practice—Right to move.*

A plaintiff cannot at the same time deliver to the same sheriff a writ against goods and another against lands, both to be acted upon.

The plaintiffs issued a writ against defendants' goods to the sheriff of W., which on the 22nd of April was returned *nulla bona*, with the consent of one of the defendants, and on that day *fi. fas.* against lands issued to the same and to other sheriffs, and an *alias fi. fa.* goods to the sheriff of W., on which latter writ he seized certain stock. A motion to set aside these writs was made on behalf of two of the defendants, and of the Bank of British North America, to whom they had given a mortgage of lands on the 17th of May, 1865,—the objections being that there had been no proper issue and return of writs against goods, and that the writs against lands and goods were concurrent.

*Held*, that the return of *nulla bona*, if any of the defendants had goods, could be only an irregularity, against which the Bank could not move, nor the defendant who had consented to it; but

*Held*, also, that as the alias writ against goods issued on the same day as the writs against lands, and had been acted upon, the latter writs were under the circumstances illegal, and must be set aside.

*Held*, also, that the mortgage to the Bank could not have prevailed against the writs, which bound the lands from their receipt by the sheriff.

*Seemle*, that one of several defendants may insist that the goods of the others shall be exhausted before a writ issues against his lands.

*Quere*, whether this application could have been entertained on the part of the Bank. *Seemle*, not.

In Easter Term *Freeman*, Q. C., obtained, from the Practice Court a rule, returnable in this court, calling upon the plaintiffs and upon the defendants Kerby and Hamilton to shew cause why the respective alias writs of *fi. fa.* against goods, and the respective writs of *fi. fa.* against lands in the hands of the sheriffs of the Counties of Wentworth, Grey, Brant, Welland, and of the united Counties of Huron and Bruce, in the above suits, should not be set aside, on the grounds, as to the writs against lands.

1. That no writs of *fieri facias* against goods were taken out in these suits and delivered to the several sheriffs, or any of them, or to the sheriff of any other county, to be executed, or were in any such sheriff's hands to be executed and returned according to law, before the said writs against the lands of the defendants were issued.

2. And as to all the writs, that the writs against the goods and lands of the defendants in these suits were issued at the same time, and placed in the several sheriffs hands to be executed, and are now being executed concurrently.

3. And as to the writ against lands to the sheriff of Brant, that it was issued and placed in the sheriff's hands when there was a concurrent writ against goods in the same suits in the hands of the sheriff of Wentworth to be executed.

4. And on the ground that the return of *nulla bona* to the writs of *fi. fa.* against goods in the above suits was collusively, illegally, and fraudulently obtained, for the purpose of enabling the plaintiffs to obtain a fraudulent preference and priority over the other creditors of the said defendants.

Or why some of the said writs should not be set aside on the grounds aforesaid, and on grounds disclosed on affidavit filed; and that in the meantime proceedings on the writs be stayed. (N.B.—The rule did not shew on whose behalf it was moved or granted.)

The rule was granted in the Practice Court, on two affidavits entitled in the above causes and in three other causes in the Common Pleas, in which three causes a joint rule similar to the one above set out was granted.

In reference to the two causes in this court, it appeared that in the first a *fi. fa.* against goods was placed in the hands of the sheriff of Wentworth on the 10th of April, 1865, for \$1,055.63, which writ was returned *nulla bona* on the 22nd of the same month. A *fi. fa.* against lands was issued on the 22nd of April, aforesaid, and was received by the sheriff of Wentworth on the 24th; and an alias *fi. fa.* against goods was issued on the same 22nd of April, and received by the sheriff of Wentworth on the 25th of the month.

In the other suit a *fi. fa.* against goods was issued, and was received by the sheriff of Wentworth on the 15th of April, 1865, for \$2,037.07, and on the 22nd of the same month was returned *nulla bona*, on which day a *fi. fa.* against lands was issued, which was received by the sheriff of Wentworth on the 24th. And on the same 22nd of April



an alias *fi. fa.* against goods issued, which was received by the sheriff of Wentworth in the same month, the day not being stated in the memorandum of the various writs attached to Mr. Craigie's affidavit.

It was stated in that affidavit, that these returns of *nulla bona* were made at the request of the plaintiffs' attorneys, and by the consent of the defendant Hamilton, but as deponent was informed and believed the consent of the other defendant was not asked or obtained : that at the time of such return the defendant Hamilton had goods liable to seizure in the County of Wentworth, and there was no execution against him, except in the plaintiffs' suits : that at the same time the defendant Kerby had goods, but they were afterwards sold on execution, prior to the plaintiffs', and produced just enough to satisfy those executions : that at the time these returns were made there was in the hands of the sheriff of Brant to be executed a writ which the plaintiffs had delivered to him in the first of these two suits, against the goods of the defendants therein, to which writ the sheriff of Brant, about the 18th of May, 1865, returned *fecit* \$104.90, the same, according to the deponent's information and belief, having been levied of the goods of the defendant Muirhead.

Both the writs of *fi. fa.* in the two suits above named were filed on the day the returns were made in the Crown office for the County of Wentworth, in which office the proceedings in these suits had been taken and the judgment entered. Upon the first of them was endorsed a *præcipe*, as follows : —“ Required on within execution and return thereof three writs of *fieri facias* against lands and tenements directed respectively to the sheriffs of the Counties of Wentworth, Welland, and the United Counties of Huron and Bruce ; also alias *fi. fa.* goods directed to the sheriff of Wentworth.” A similar *præcipe* was endorsed upon the *fi. fa.* in the second of these suits. The writs required by these *præcipes* were issued on the 22nd of April, and the deputy clerk of the Crown stated it was impossible to tell which writ was first issued ; all were issued as nearly as possible simultaneously. The writs to the sheriff of Wentworth were delivered to him

as already stated. Upon the 24th. of April, 1865, on a *præcipe* filed in each of these suits, a writ of execution was issued against the lands of the defendants therein respectively, directed to the sheriff of Grey. The writs so issued against lands directed to the several sheriffs of Grey, Welland, Huron and Bruce, had been delivered to those sheriffs, as deponent was informed and believed.

Upon the return of the *fi. fa.* against goods directed to the sheriff of Brant, a *fi. fa.* against lands and tenements was issued, directed to the same sheriff, which, as deponent was informed and believed, was delivered to him.

The sheriff of Wentworth, by letter dated 3rd May, 1865, was instructed to seize certain shares of stock in the Great Western Railway Company and the Canada Life Assurance Company, and the sheriff has seized accordingly.

By indenture dated 17th May, 1865, defendant Hamilton had conveyed by way of mortgage lands in Wentworth, Welland, Grey, Bruce and Wellington, and a part of his personal estate, to secure to the Bank of British North America and to the Ontario Bank (the plaintiffs) payment ratably of \$11,100 to the first and \$11,200 to the latter, being the principal sums due by him to them respectively. The defendant Overfield had made a similar conveyance of lands and personal estate, to secure payment to the same two Banks and to the Bank of Toronto ratably. The Bank of British North America had accepted.

Mr. Craigie swore he had been instructed by the Bank of British North America and by defendants Hamilton and Overfield to act as their attorney in making application to set aside the said writs of execution.

The defendant Hamilton made an affidavit, stating that before the commencement of these suits the plaintiffs knew he was, with the other defendants, largely indebted to the Bank of British North America: that he consented to the *fi. fa.* goods in these suits being returned *nulla bona*, on receiving a letter from the sheriff, stating that the plaintiffs' attorney desired the return: that he had goods and chattels of considerable value in the County of Wentworth, and it was an object to him to prevent their being taken in execu-

tion, but he had no expectation that the result would be to give the Ontario Bank a preferential lien over his land to the exclusion of other creditors.

In reply the plaintiffs' attorney swore, that the *fi. fas.* (goods) were put into the sheriffs' hands to be executed, but that he soon became aware there was no prospect of making anything upon them, as he verily believed that Hamilton, Kerby and Overfield had no goods, and Muirhead's goods were subject to prior executions, and that Hamilton's personal property, which might have realized \$200 or \$300, was in great part claimed by a daughter of his; therefore the sheriff was requested to return those writs *nulla bona*: that on the 19th of May, he withdrew from the hands of the sheriff of Wentworth the *al. fi. fa.* goods in one of the suits in the Common Pleas, and the *fi. fa.* against lands in another of the suits in that court: that there are not now (1st of September, 1858,) nor have been since the 22nd of May last, concurrent writs in the hands of the sheriffs of any or either of the counties mentioned in Craigie's affidavit, against the lands and goods of either of the defendants, to be executed: that since the date of this application the defendant Hamilton had told him it was made at the instance of and solely for the Bank of British North America.

*Moss* shewed cause, citing *Oswald v. Rykert*, 22, U. C. R. 306; *Curry v. Turner*, 8 U. C. L. J. 296.

*Freeman Q. C.*, contra, cited *Lofft* 248.

DRAPER, C. J.—It seems clear that after the return of *nulla bona* to the writs against goods in these two cases, and on the 22nd of April last, the plaintiffs issued writs against lands directed to the sheriffs of Wentworth, Welland, and the United Counties of Huron and Bruce, and alias writs against goods to the sheriff of Wentworth, to whom the writs against lands were delivered on the 24th, and the alias writs against goods on the 25th of that month. On these last writs there has been a seizure, but so far as appears no sale.

The writs against lands were grounded on the return of *nulla bona*, above stated. Writs of execution are no longer



returnable on a day certain, but immediately after the execution thereof. They are in force for a year. If either of these defendants had goods they should have been seized and sold before writs against lands were issued, but the return of *nulla bona* under such circumstances would be only an irregularity (*Doe Spafford v. Brown*, 3 O. S. 92,) against which Hamilton could not move, for he consented to it, and against which neither of the other defendants have moved. The Bank of British North America cannot be heard on this ground, nor at this stage.

There do not appear to have been any goods except those of Hamilton liable to execution, and their value in relation to a debt of \$11,000, especially if his right to the greater part of them was questioned, was insignificant. The shares of the stock of the two companies (as to which we have no particulars of number or value) were apparently unknown to the plaintiffs or to the sheriff to have belonged to Hamilton until after the return of *nulla bona*. The plaintiffs' attorney swears these first writs were placed in the sheriff's hands for execution. The first objection in the rule therefore fails. We agree in the view taken on this part of the case by the Court of Common Pleas (a).

As to the effect of the deeds made by Hamilton and Overfield to the Bank of British North America, we are of opinion they cannot prevail against the executions against lands, which bound the land from the time they were received by the sheriff. Between that time and the date of these instruments there was a lapse of three weeks or more. If these writs are maintained, and they were then in the sheriff's hands, the land could only pass subject to them.

But on the same day that these writs against land bear date the plaintiff also issued in each cause an alias *fi. fa.* against goods to the sheriff of Wentworth, and the sheriff has thereunder seized chattels belonging to Hamilton, *i. e.*, the shares above mentioned. There has been therefore a commencement of execution against goods upon writs issued simultaneously with the writs against lands.

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(a) See *The Ontario Bank v. Kerby et al.*, 16 C. P. 35.

I will not say that the plaintiffs might not have abandoned the seizure of these goods, and thus have upheld the writs against lands, but here both are together in force, and in the same sheriff's hands. See *Dicas v. Warne*, 10 Bing. 341; *Knight v. Coleby*, 5 M. & W. 274. The object of the statute (C. L. P. Act, sec. 252,) is plain "Goods and chattels, lands and tenements, shall not be included in the same writ of execution." It would be a palpable evasion of this enactment to say that the plaintiff may at the same time deliver to the same sheriff a writ against goods and another against lands, both to be acted upon. The Legislature intended the personal estate to be exhausted before the lands were touched, but in these cases proceedings are going on against both at the same time. On this point there is no question of consent by one defendant, though if there were I think another defendant might insist that the goods of other defendants must be exhausted before a writ was issued against his lands. This objection did not exist in the cases before the Court of Common Pleas. We have been favoured with an opportunity of knowing the ground of the judgment delivered the other day in that court, and so far as the facts correspond we would have followed their decision. But the question we have to determine was not before them, and our conclusion upon it is, that under the circumstances the writs against lands are contrary to the spirit and intention of the statute, and must be set aside.

We understand this application is made on the part of the execution debtors or some of them. As at present advised I do not think we could have entertained it on the part of the Bank of British North America, though possibly further examination might change my present impression on that point.

Rule absolute

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## MICHAEL D'ARCY V. STEPHEN WHITE AND JAMES WILSON.

*Ejectment—Judgment by default—Costs.*

An ejectment summons having been served on A. and B., A. only defended, and B. allowed judgment to go by default. The plaintiff obtained a verdict and issued a *hab. fac.* and *fi. fa.* for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings; but

*Held*, that the plaintiff was right, for as to the *hab. fac.*, if B. claimed no interest in the land, and was not in possession, he should have applied on receiving the summons to have his name struck out; and as to the *fi. fa.* for costs, he was liable, for although if sole defendant he would not have been, yet when there are two persons in possession and one appears the judgment is suspended till the trial of the issue, if the latter succeeds it enures to the benefit of the other, and if he fails both are liable for the whole costs, (as in an action for damages) of which there can only be one taxation.

The plaintiff, on the eleventh day of July, 1864, issued an ejectment summons against both the defendants, to recover possession of part of lot number twenty in the fifth concession of the township of North Burgess, specially described. On the 22nd of August, 1864, James White appeared by attorney, and defended for the whole premises, and no appearance was entered or defence made by the defendant Stephen White, and an entry was made on the roll, that the plaintiff ought to recover against him the possession of the said land, but proceedings against him were stayed until the determination of the issue between the plaintiff and James White. That issue was tried on the 13th of October, 1864, when the jury rendered a verdict for the plaintiff, on which judgment was entered on the 26th of April, 1865, that the plaintiff recover possession of the land in the writ of summons mentioned, and \$166.84 for costs of suit.

On the same 26th of April, 1865, the plaintiff issued a writ, reciting that he had lately recovered possession of the premises mentioned in the writ of summons in an action of ejectment, at his suit, against Stephen White and James White, commanding the sheriff to cause the plaintiff to have possession of the said land and premises, with the appurtenances, and further commanding the sheriff of the goods and chattels of the said Stephen White and James White



that he should cause to be made \$166.84, which the plaintiff lately recovered against them for his costs of suit.

And Stephen White obtained a rule calling on the plaintiff to shew cause why the writ of *habere facias possessionem* and *feri facias* against goods should not be set aside as against him, on the ground that the judgment entered only awarded possession as against him, and that he had not appeared and defended; or why the *fi. fa.* against goods should not be set aside as against Stephen White; or why the judgment should not be set aside as against Stephen White, for directing generally that the plaintiff should recover possession and costs, not saying of whom the costs should be levied, whereas it should have directed that they should be recovered of the defendant James White, the defendant Stephen not having appeared and so not being liable for costs; and that no proper interlocutory judgment was signed against Stephen; or why the judgment should not be amended, so as to direct definitely against whom execution for costs should be directed; or why Stephen White should not be relieved from being a defendant, and have his name struck out of the proceedings, on the ground that at the commencement of this suit he had no interest in the premises, and was not in possession, and did not appear and defend; or why all proceedings to recover costs under the judgment and writ should not be stayed, on such terms as to costs as the court might direct.

In the affidavit filed in this case, it was stated that a seizure of goods of Stephen White had been made under this execution, and that no action for mesne profits had been brought against him. It was also sworn on his behalf that on the 23rd of April, 1864, he executed a quit-claim deed to his son, the other defendant, of the premises mentioned in the writ of summons, the consideration being a debt of £25 due by the father to the son for working on his farm, and five shillings.

Stephen White swore, among other things, that he had never used or occupied any part of the land sued for, except about fifteen acres, which (with other land) he conveyed, on the 23rd of April, to his son James, which conveyance was made in pursuance of an agreement made between them,

that James should come and work with Stephen for a year, which he did, and thereupon Stephen conveyed to him; that the land was poor and not worth more than a reasonable compensation for James's service. He denied that he was concerned in or privy to the defence. And after the sale to James he swore he did not occupy or use the land in any way, other than for the pasturage of some young cattle, for which he paid James: that he never was notified by the plaintiff of his title to the land: that he attended the trial of this cause merely from curiosity, and not from any interest he had himself in the matter, and as he had not for years been able to work, he lost nothing by his attendance at court.

On the other hand, the plaintiff swore, that after he had purchased these premises he found Stephen White in possession, and applied to him to give them up, but he did not do so, but continued to possess the same till he was put out by the sheriff, but that he pressed the plaintiff to sell him this land: that the defendant James was living with his father, and had no separate dwelling, and was not more than twenty-two or twenty-three years of age: that notwithstanding the transfer, Stephen White, during the summer of 1864 and spring of 1865, used the land, and pastured his cattle thereon, as he formerly used to do, and removed his cattle therefrom two or three days before the plaintiff was put into possession. And the statement that Stephen was for several years in possession of these premises until ejected was confirmed by another deponent, who also swore that he was satisfied James White had no property.

*Robert A. Harrison* shewed cause, citing *Roots v. Farniscott*, 2 P. R. 239; *Harper v. Lowndes*, 15 U. C. R. 430; *Haskins v. Cannon et al.* 2 P. R. 334; *Wilkinson v. Kirby*, 15 C. B. 430; *Anstey v. Edwards*, 16 C. B. 212; *Hutchinson v. Greenwood*, 4 E. & B. 324; *Bleecker v. Campbell*, 4 U. C. L. J. 136; *Consol. Stat. U. C. ch. 27, secs. 16, 26.*

*Kingsmill*, contra, cited *Cole on Ejectment*, 131; *White v. Cochlin*, 2 P. R. 249; *Mobbs v. Vanderbrande*, 9 L. T. Rep. N. S. 761; *Doe dem. Wright v. Smith*, 8 Dowl. 517.

DRAPER, C. J., delivered the judgment of the court.

We think, upon Stephen White's own shewing that he pastured his cattle on this land, on which it does not appear there was any dwelling-house or building, the plaintiff had reasonable ground for making him a defendant, as well as the son James. If Stephen had, immediately on being served with the ejectment summons, made oath that he was not in possession, and claimed no interest in the land at the time of the service, or perhaps at the date of the summons, and this statement was not rebutted, he might have had the service on himself set aside, and his name struck out of the writ, upon proper terms. But letting judgment go by default, which is the effect of not appearing, must be considered as an admission that he was in possession, for such judgment is a sufficient foundation for a writ to put the plaintiff into possession. He now, among other things, applies for this relief, but I think for this purpose he comes altogether too late. The question is then reduced to his liability to costs.

Although if Stephen had been sole defendant the plaintiff could have had no judgment or execution against him for costs, yet we apprehend that when there are two persons in possession and both are sued, if the plaintiff fails in proving his case against one who defends, he cannot get possession against the other who does not appear to the writ. The judgment of the court is suspended until the issue be tried; and if the defendant who appears is successful, it in effect enures to the benefit of the other. There can only be one taxation of costs where the plaintiff succeeds against all the parties he sues. In an action for damages, if one defendant suffers judgment by default and the other pleads to issue, and the jury find for the plaintiff, there is one entry of judgment for the same costs and damages against both, though the plaintiff's costs must be materially increased by having to go down to trial, which only was made necessary by the act of one defendant.

No authority has been cited which would afford even a pretext for holding that there could be a severance of the taxation of costs in a case like the present, and the analogy of other actions is against such a practice.



The Ejectment Act does not provide for awarding costs when there is only a judgment by default, but where there is a trial it expressly authorizes costs to be recovered; and as it must be assumed the defendants are jointly in possession, the recovery by verdict against one will, we apprehend, draw with it all the consequences as regards the other.

We think therefore this rule should be discharged.

Rule discharged.

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ROBSON V. WADDELL ET AL.

*Registry—9 Vic. ch. 34—Addition of witness omitted.*

The 9 Vic. ch. 34. requires that every memorial shall contain (among other things) the names and additions of all the witnesses to the deed, and provides that every deed shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee, "unless such memorial be registered as by this act is directed," before the registering of the subsequent deed.

*Held*, that registry in accordance with the act was imperative; and a deed registered upon a memorial in which the addition of the witness to the deed was omitted, was therefore held fraudulent and void as against a subsequent mortgagee.

EJECTMENT for three acres, part of lot number nine, in the first concession of Grimsby, (described in two parcels by metes and bounds). Writ issued 26th March, 1862. Appearance for the whole.

The case was tried at Niagara, in April, 1862, before *Draper, C. J.* The plaintiff put in and proved the execution of a deed, dated 23rd December, 1846, whereby Henry Riggs Goodman and Arabella his wife, in consideration of £400, granted, bargained, sold, &c., to Thomas Bingle, the premises mentioned in the writ, habendum in fee. At the time of the execution of this conveyance Goodman was in possession of the premises by his tenants.

He also put in and proved a deed, dated 7th August, 1857, from Thomas Bingle and wife to John Fiske, by way

of mortgage, in fee, to secure the payment of £300, or such part thereof as the full balance might amount to that should be due at any time thereafter to Messrs. Ross, Mitchell & Co., from one James Ruthven.

Another deed was produced and proved for the defendant, dated 27th March, 1857, whereby Thomas Bingle and wife, in consideration of £750, conveyed in fee to Robert R. Waddell the same premises.

On the deed first above mentioned was endorsed a certificate of the registrar, that a memorial of that deed was recorded in the Register of Grimsby, the 21st of May, 1857, at 10 a.m. On the deed of the 27th of March, 1857, was endorsed a certificate of the registrar, that a memorial thereof was recorded in the register of Grimsby, on the 11th of May, 1857, at 10 A.M.

A notice, dated 22nd January, 1859, was produced for the plaintiff, signed by "John Crawford, assignee of the said John Fiskien, and Ross, Mitchell & Co.," and by "John Fiskien, the mortgagee named in the said indenture," and by "Ross, Mitchell & Co.," addressed to Thomas Bingle. It demanded payment of the sum of £300, as due upon the mortgage, stating that a larger sum was due by James Ruthven to Ross, Mitchell & Co., on a judgment recorded. This notice was sworn to have been found after the death of Thomas Bingle among his papers.

The mortgage Bingle to Fiskien had a certificate endorsed on it, of its registry on the 12th of August, 1857.

Proof was given that the notice above mentioned was in Bingle's possession after its date, and before the expiration of the time mentioned therein, and also of the debt due by Ruthven to Ross, Mitchell & Co.

An admission was also put in on behalf of the plaintiff, by which his title to the premises under the conveyance of the 7th of August, 1857, was admitted.

The plaintiff admitted that the defendants had in them whatever title Robert R. Waddell had under the deed to him of the 27th of March, 1857.

The original memorial of this deed was then produced by the registrar of the county, and a copy thereof was put in

and filed in lieu thereof. This memorial contained as follows (among other things) "which said indenture is witnessed by James Ruthven of the City of Hamilton, and William Armstrong of the City of Hamilton, in the County of Wentworth." The memorial was executed by the grantee. James Ruthven proved the execution of the deed by all the parties, and that he was a subscribing witness thereto, and that he saw the memorial signed and sealed by the grantee, which memorial was attested by himself and another subscribing witness, and that both instruments were executed in the City of Hamilton. In this affidavit Ruthven was described as "of the City of Hamilton, in the said county" (Wentworth) "in the said memorial named."

On reference to the deed it appeared that Ruthven was the only subscribing witness to it.

The plaintiff's counsel objected that the description of Ruthven as a witness to the deed, as stated in the memorial, was insufficient under the Registry Act, as his addition was not given; and that the memorial erroneously stated that the execution of the deed was attested by two witnesses.

The objection was over-ruled, and a verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him on the whole evidence; the court to be at liberty to draw conclusions of fact as a jury might do.

This cause was argued in Hilary Term, 27 Victoria, (February 13th, 1864,) by *Robert A. Harrison* for the defendants, and by *Crombie* for the plaintiff, upon a rule calling on the defendants to shew cause why the verdict should not be entered for the plaintiff, pursuant to leave reserved.

The following authorities were referred to in the argument:—*Essex v. Baugh*, 1 Younge & Coll. C. C. 620; *Brandling v. Plummer*, 3 Jur. N. S. 401; *In re Fitzgerald*, 11 Ir. Chy. Rep. 278; *In re Boate*, 9 Ir. Chy. Rep. 524; *In re Hamilton*, Ib. 512; *In re Jennings*, 8 Ir. Chy. Rep. 421; *Fonblanque v. Lee*, 7 Ir. C. L. Rep. 550; *Harding v. Carry*, 10 Ir. C. L. Rep. 140; *Cheek v. Jefferies*, 3 D. & R. 185; *Hart v. Lovelace*, 6 T. R. 471; *Ex parte Mackreth*,



2 East, 562; *Smith v. Pritchard*, 1 D. & R. 374; *Allen v. Thomson*, 1 H. & N. 15; *Pickard v. Bretz*, 5 H. & N. 9; *Beales v. Tennant*, 6 Jur. N. S. 628; *Couse v. Hannan*, 14 C. P. 26; *Doe dem. England v. Crysdale*, 6 O. S. 254; *Proudfoot v. Lount*, 9 Grant, 70; *Boucher v. Smith*, Ib. 347; *Gardiner v. Blesinton*, 1 Ir. Chy. Rep. 79, 88; *O'Brien v. Tylee*, 1 Ir. C. L. Rep. 647; *In re Reilly*, 2 Ir. L. R. 245; *Mill v. Hill*, 3 H. L. Cas. 828; *McDowell v. Wheatty*, 7 Ir. C. L. R. 562; *Regina v. The Registrars of Middlesex*, 5 Jur. N. S. 98; *Gildersleeve v. Corby*, 15 U. C. R. 150; *Powis v. Harding*, 1 C. B. N. S. 533; *Dossett v. Harding*, Ib. 524; *Daniell v. Royal British Bank*, 1 H. & N. 681; *Henderson v. Royal British Bank*, 7 E. & B. 356; *Reid v. Whitehead*, 10 Grant, 446.

DRAPER, C. J., delivered the judgment of the court (*a*).

The principal, indeed the only question for consideration, is whether,—inasmuch as in the memorial of the deed of the 27th of March, 1857, only the name and place of abode of the sole subscribing witness James Ruthven is given, without any addition of either “estate, degree, or mystery” as mentioned in the old statute of 1 Hen. V, in relation to defendants in an indictment,—this deed is to be adjudged fraudulent and void as against the mortgage of the 7th of August, 1857, under which the plaintiff claims, and which was registered in the manner required by the statute on the 12th of August, 1857.

The statute in force at the date of both deed and mortgage was the 9 Vic. ch. 34, since consolidated in chap. 89, Consol. Stat. U. C.

The following provisions are to be considered:—Sect. 6, after giving an option to persons deriving title from the grantee of the crown to have their deeds or conveyances registered as by the act is provided, enacts that every deed and conveyance that shall, after a prior registry, be made

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(*a*) The judgment was deferred for several terms, in order to see whether the new Registry Act, known to be in contemplation, would not put an end to the question raised. It, however, contained a clause exempting all suits pending from the provision which would otherwise have had that effect. See 29 Vic. ch. 24, sec. 78.

of any lands, &c., contained in the prior registry, "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

By section 7, all memorials to be registered shall be put into writing, and in case of deeds or conveyances shall be under the hand and seal of some or one of the grantors or grantees, his or their heirs, &c., attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance, which witness shall, upon oath before, &c., prove the signing and sealing of such memorial and the execution of the deed or conveyance mentioned therein.

By section 8, every memorial shall contain the day of the month and the year when such deed, &c., bears date, and the names and additions of all the parties thereto, as mentioned or set forth in such deed, &c., and of all the witnesses to such deed, &c., and the places of their abode, and shall express, &c., the lands, &c., contained in such deed, &c., that are given, granted, conveyed, devised, or any way affected or charged by any such deed, &c.

This section also prescribes the duty of the registrar; enacting that the deed, &c., shall be produced to him at the time of entering such memorial: that he shall endorse a certificate on every such deed, &c., and therein mention the certain day, hour and time on which such memorial is entered and registered, expressing in what book, page and number the same is entered; that he shall sign the certificate when so endorsed, which certificate shall be taken and allowed as evidence of the registration in all courts of record. He must also number the memorial and enter the day of the month and the year, and hour or time of the day when every memorial is registered, in the margin of the register book, and of the memorial; and he must register the memorials in the order in which they come to his hand.

There was a memorial of the deed of the 27th of March,

1857, registered as directed by the statute before the registering of the memorial of the mortgage of the 7th August, 1857. In point of fact a memorial of the deed was registered nearly three months before the date, and therefore presumably as long before the execution, of the mortgage. And the only objection taken to this registry is, that the addition of the sole subscribing witness to the deed is not contained in the memorial. It is therefore for the purposes of this decision to be assumed that the memorial itself was duly executed, as well as that its execution and that of the deed were properly proved; further, that it contained the date of the deed, and the names and additions of all the parties to the deed as set forth therein, and the name and place of abode of the subscribing witness; and that it mentioned the lands contained in the deed and the township in which they are situate, in the manner in which they were described in the deed. The deed and the original memorial were both produced at the trial, and the want of the addition of the witness was the only exception taken.

We consider the sixth section to be imperative both in form and substance, and it declares the prior deed to be "fraudulent and void," against a subsequent purchaser or mortgagee for valuable consideration, unless such memorial as by the act is directed be registered before the registering of the deed or conveyance under which the subsequent purchaser or mortgagee claims. In other words, it makes the registry of such a memorial as the act directs a condition precedent to the validity and effectual operation of the prior deed as against the subsequent purchaser or incumbrancer, —not merely the registry of a memorial, but of such memorial as the act directs. To register any other than one in accordance with the directions of the act must therefore be nugatory.

Then among the directions is one, that every memorial shall contain the names and additions of the witnesses to the deed and the places of their abode. It is enough to insert the names and additions of the parties to the deed, in the same manner or words as they are set forth therein; but with regard to the subscribing witnesses, their names and



additions, and places of abode (though the two latter are rarely if ever in this country mentioned in the attestation) must be set forth in the memorial. The place of abode of a witness, when, as in the present case, his identity was established on his own oath at the trial, may be deemed unimportant; but it is one of the things which the statute requires, and the courts neither can nor should endeavour to dispense with it, though in the particular instance, and even generally, they may think it of little value.

It might be argued that the whole object of registration was notice, or, in the language of *Robinson, C. J.*, in *Doe England v. Crysedale*, "to prevent a subsequent purchaser gaining priority," and that there was as full notice on the face of the registry book to the subsequent mortgagee as could be given; and that the "addition" of the subscribing witness could not by possibility have made the notice clearer, though it might have facilitated enquiry as to the transaction. It might also be argued that a memorial of this prior deed was in fact entered in the registry book, and that the registration of the deed was certified on the back thereof by the registrar, and that both these acts were completed before the execution of the subsequent mortgage; but the answer is, that such a memorial as by the act is directed has never been entered, and therefore the certificate of the registrar wants the necessary foundation. And though the statute makes the certificate of the registrar evidence of registration in all courts of record, it is not made conclusive, so that parties interested cannot go behind it and shew that the statute has not been complied with.

We may think the objection to be strictly literal and technical, and may regret an omission such as has been made, which has not, and scarcely could under all the circumstances have operated to the prejudice of the subsequent mortgagee: that in fact it may have been rather a search after objections, than for notice or information, that the discovery of this defect is owing; but we cannot see in all this a sufficient reason for disregarding the language of the act. In searching into the title, this objection would be patent on the face of the memorial as entered in the registry

book, without examination of the memorial itself, and the only reason for going behind the entry would be to see that the defect was not an error in transcribing. Here there is no opening for such a conclusion.

Our judgment therefore must be founded on the statute. We are bound to hold that this non-compliance with one of its express requirements makes the prior deed fraudulent and void as against the subsequent mortgagee, and the rule to enter the verdict for the plaintiff must be made absolute.

Rule absolute.

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### HIBBERT V. SCOTT.

#### *Award—Finality and certainty—Pleading.*

Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others the costs of a certain action in the C. P. between the parties, and awarded that defendant should convey certain specified land to the plaintiff in fee, and should pay him all costs of the reference and of the said action in C. P., and that they should execute mutual releases. *Breach*, non-payment of the costs of reference or of the suit. Defendant pleaded 1. *Non est factum*. 2. That the arbitrators did not make any such award.

The award mentioned no suit, but awarded the costs of reference "and also all costs that may have been incurred by any legal process through which the matter relating to this arbitration may have passed previous to this award." The plaintiff's attorney in the suit in C. P. produced the bill of costs in that suit.

*Held*, that the award was sufficiently certain and final, if the existence and subject of the suit, and its connection with the matters referred had been properly set out in the declaration and proved; but that, on these pleadings, the suit and the fact of its reference might be taken to be admitted;—and a verdict for the plaintiff was therefore upheld.

DECLARATION on a bond, in a penalty of \$600, conditioned to abide by the award of three persons named, chosen as arbitrators to determine all actions, suits, controversies, &c., pending, &c., between the parties; the award to be made by the referees, or any two of them, by a day named. *Averment*, that the referees heard all matters in difference, amongst others the costs of a certain action in the court of

Common Pleas, wherein Hibbert was plaintiff and Scott defendant, being one of the matters in difference; and two of the referees did within the time make an award, that defendant should convey certain specified land to the plaintiff in fee, and should pay to the plaintiff all costs incurred in or by the reference, and all plaintiff's costs of the said action in the court of Common Pleas, and that within ten days the parties should execute mutual releases. *Averment* that defendant did duly convey the land to the plaintiff as directed by the award, yet he refuses to pay the arbitrators' costs, and the plaintiff's costs in the action in the Common Pleas, whereby an action hath accrued, &c.

*Pleas 1.—Non est factum.*

2.—That the arbitrators did not make any such award of and concerning the matters referred to them as alleged.

The case was tried at Goderich, before *John Wilson, J.* The bond was proved, and an award by two of the referees. The award made no specific mention of any suit in the Common Pleas or elsewhere, but had these words: "We, the said arbitrators, do award and order that the said W. Scott shall pay or cause to be paid all the costs, charges and expenses incurred by or in consequence of the said arbitration, and this our award in writing, and also all costs through that (a) may have been incurred by any legal process which the matter relating to this arbitration may have passed previous to this award being given by the said arbitrators."

Mr. Gooding swore that he was attorney in the original action, which ended in the submission. He produced a bill of costs headed in the suit of Hibbert v. Scott, and as plaintiff's costs between attorney and client; action on bond for deed of road allowance between eight and nine in the third concession of Morris. He said the amount charged was fair, and no taxation was proved.

A nonsuit was moved for on grounds appearing in the rule *nisi*, on which defendant had leave to move, and a verdict was rendered for the plaintiff.

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(a) Sic.



In Easter Term *Robert A. Harrison* obtained a rule *nisi* to enter a nonsuit, on these grounds:—1. Excess of authority as to costs of reference. 2. That an award of costs of and incurred by legal process (setting out the words of the award already quoted) was insufficient, without shewing that there were such costs existing between the parties at the time of the submission.

3. That the award is uncertain and insufficient, in not stating the amount of costs, or in what court incurred, or other particulars.

4. That the award does not dispose of the cause in which the costs were incurred.

5. That there was no legal evidence of the existence of any such suit.

*Moss* shewed cause, and cited *Russell on Awards*, 358, 361, 373; *Firth v. Robinson*, 1 B. & C. 277; *In re The Corporation of Northumberland and Durham*, and *The Corporation of Cobourg*, 20 U. C. R. 283; *Bradley v. Phelps*, 6 Ex. 897; *Creswick v. Harrison*, 10 C. B. 441; *Pascoe v. Pascoe*, 3 Bing. N. C. 907.

*Robert A. Harrison*, contra, cited *Roberts v. Eberhardt*, 3 C. B. N. S. 482, 506; *Whittemore v. Smith*, 5 H. & N. 824; *In re Tribe and Upperton*, 3 A. & E. 295; *In re Brown and Overholt*, 2 P. R. 9; *Wakefield v. Llanellay R. W. and Dock Co.*, 12 L. T. Rep. N. S. 509; *Nickels v. Hancock*, 7 DeG. M. & G. 300; *Russell on Awards*, 248, 275, 658, 660.

HAGARTY, J.—The arbitrators had clearly no power to award costs of the reference, and that part of the award is bad, but as it is easily separable from the rest it does not vitiate the whole.

As to the second objection, I think an award directing that one party should pay all costs incurred by or on any legal process relating to the matters of the award, which this award in substance does direct, can be supported (apart from any other objections) without a more specific description of any suit or process.

The award itself could I think be supported on the facts

of the case, if properly pleaded and regularly proved. If it had been averred in the declaration that a suit had been pending in the Common Pleas, the object of which was to compel the conveyance of the road allowance, or to obtain damages for not conveying: that this suit was referred, or amongst the things referred; then that this award was made, and that defendant had in obedience thereto conveyed the land, the subject matter of the suit, leaving only the costs of the suit unsettled,—then, on legal proof of all these facts, I incline to think the plaintiff could recover.

But the difficulty I feel is that neither the declaration or the evidence in any way explains the subject matter of the suit.

The proper course, at least the safest, would doubtless have been to produce an exemplification of the proceedings or other formal proof of their existence as far as they had advanced, and then connect them by parol testimony with the matters submitted, and with the decision of the referees as to conveying the land, and defendant's obedience thereto.

This course unfortunately has not been pursued. The attorney has merely produced a bill of costs, which he says is the bill in the original action, which ended in this submission.

This certainly does not seem to be a sufficient proof of the existence of a legal proceeding, against an objection specially taken, as it was, at the trial.

It seems to me that the objection must prevail, unless we can hold that the fact of there being such a suit, and that it was a matter referred to the arbitrators, stands admitted on the record.

The declaration avers that such was the case. The defendant pleads to the action on the bond *non est factum*, and a denial that any such award as that set forth was made. Is the suit and the fact of its reference admitted by these pleadings?

The case may be thus stated:—The plaintiff avers that defendant made a bond binding himself to obey the award of three persons to be made as to all matters in dispute: that the referees entered upon the disputed matters, one of

which was a certain suit (describing it,) and they awarded that defendant should pay the costs of that suit. Defendant says in answer, "I never made such a bond, and the referees never made such an award."

It seems clear that under this traverse the defendants can urge there was no good and valid award.

I think the award can be supported as sufficiently certain and final. The defendant is to convey land; he is to pay the costs of "any legal process through which the matters relating to this arbitration may have passed;" and mutual releases are to be exchanged. This would seem to dispose with sufficient certainty of the matters referred.

After very considerable doubt I have arrived at the conclusion that on the issues as joined, the existence of the Common Pleas suit, averred in the declaration as a matter submitted to the arbitrators, stands admitted.

No case has been cited bearing on the question, and I have not found any. In the absence of direct authority, I do not see why the general rule as to material averments not traversed should not apply in a case like this. The rule of law as to the effect of these traverses, especially in actions of debt on bond, is not very clear.

I am not free from doubt, but on the best consideration I can give the case I think we may decide against the objection.

It is unfortunate that this loose method of getting up evidence should cause the serious expense and trouble of arguing such technical points, especially in a suit where the true amount sought to be recovered is about \$30.

MORRISON, J., concurred.

THE CHIEF JUSTICE, having been absent during the argument, took no part in the judgment.

Rule discharged.

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## LOSEE V. MURRAY.

*Dower—Pleading—Evidence.*

Dower. Plea, that the demandant never was accoupled to the said J. L. (the husband) during the time the said J. L. was seised of the said land. Held, that the plea admitted the seisin, and denied the coverture only.

The demandant claimed dower in lot number twenty-six, in the sixth concession of the Township of Vaughan, as widow of Joseph Losee, deceased, heretofore her husband. *Plea*, that the demandant never was accoupled to the said Joseph Losee in lawful matrimony during the time the said Joseph Losee was seised of the said land.

The case was tried at the assizes for York and Peel in May last, before *Richards, C. J.* The demandant gave evidence of her marriage by reputation, such as is commonly received in this province to establish marriage, and gave evidence of the death of the husband, but proved nothing else. On the case being closed after this evidence, it was objected for the defendant that it lay upon the demandant to prove that her husband was seised of this land during the coverture. The learned Chief Justice reserved leave to move upon this ground, and directed the jury that there was evidence for them to decide as to whether the demandant was married to Joseph Losee: that it was admitted by the plea that he was seised of the premises at one time; and that there was nothing to shew that he had parted with the property at any time.

The jury found for the demandant.

*M. C. Cameron, Q.C.*, obtained a rule calling on the demandant to shew cause why a verdict should not be entered for the tenant, pursuant to the leave reserved, or why there should not be a new trial, the verdict being contrary to law and evidence, and for mis-direction, in telling the jury that there was evidence that the husband was seised during the coverture of the demandant.

In this Term *C. S. Patterson* shewed cause, citing *Tay. Ev. 4th Ed. sec. 155.*

DRAPER, C. J., delivered the judgment of the court.

It is only by contending that the plea is double, and traverses two distinct facts, that the defendant can hope to sustain his rule.

The plea denies that the demandant was accoupled to Joseph Losee, not at any time, but during a particular period. The demandant claims dower of certain lands of the endowment of Joseph Losee, heretofore her husband. The denial of the marriage is the only express denial in the plea, and that is a negative pregnant with the affirmative that during some other period than that during which he was seised of the land she was accoupled to him.

When evidence was given of marriage sufficient to go to the jury, the defendant puts this construction on his plea, viz., that it is a denial of the seisin at the time of and during the coverture.

We agree with the learned Chief Justice, that the plea admits a seisin and denies the coverture only, though somewhat informally, and that if the seisin came to an end, so as to defeat the right which proof of the marriage *primâ facie* established, it was for the defendant to have denied the seisin instead of admitting it.

Rule discharged.

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FORESTER AND THE CORPORATION OF THE TOWNSHIP OF  
ROSS.*By-law—Refusal to quash.*

The court, under the circumstances of this case, set out below, refused to quash a by-law authorizing the erection of a town hall, the objection being that they had already by previous by-laws selected another site and contracted to build it there.

In Easter Term *Robert A. Harrison* obtained a rule calling upon the Corporation to shew cause why their by-laws respectively numbered 96, 102, 103, 104, 105, and a by-law amending number 104, or some or one of them, should not be quashed with costs, for illegality, in this, that the council having duly passed by-law number 94, enacting that the town hall of the township should be built on the north half of lot number nine, in the eighth concession of that township, in accordance with the vote of the rate-payers and that such lot should be the site of the town hall; and having authorized advertisements to be published for tenders for erecting such hall, and having appointed a building committee to superintend the erection, and having by by-law appointed a surveyor to superintend the work, and having accepted a deed of part of the lot and registered the same, and having entered into a contract for building the town hall on that land, and not having disposed of the land; had no power again to submit the question of the site of the town hall to the rate-payers, nor to pass the subsequent by-laws, which either repealed number ninety-four and the by-law amending the same, or authorized the selection of a new site, or building upon it.

In this Term *C. S. Patterson* shewed cause, citing *McMaster and The Corporation of Newmarket*, 11 C. P. 398; *Sutherland and The Municipal Council of East Nis-souri*, 10 U. C. R. 626; *Stanley and The Municipality of Vespra and Sunnidale*, 17 U. C. R. 69; *Ianson and The Corporation of Reach*, 19 U. C. R. 591; *Sheley and The Corporation of Windsor*, 23 U. C. R. 569.



DRAPER, C. J., delivered the judgment of the court.

With one exception, the facts stated in the foregoing rule as constituting the alleged illegality are not denied. The exception is the entering into a contract for the building, as to which it is sworn by the Reeve that one of the contractor's sureties never did execute the contract until after it had been abandoned: that the same was wholly abandoned by all the parties thereto: that no work was done, nor anything paid on account thereof: that a fresh contract for building the town hall has been entered into with the same contractor and the corporation to erect the town hall at the site now selected; and that at the time of the service of the above rule on the Reeve, the town hall was about half completed: that the contractor had been paid on account \$147 or thereabouts; and that any change of the present site would be highly injurious to the corporation.

It is not suggested that in any of the by-laws moved against the corporation have omitted any preliminary proceeding required by statute, or have violated any of its positive provisions. The objections may be resolved into this, that they had gone too far in selecting the site and contracting for the building upon lot number nine, in the second concession of Ross, to retrace their steps and to select another site, and to erect a town hall thereon. Unless this be an illegality within the meaning of the statute sufficient to make the subsequent proceedings void, the question addresses itself solely to the discretion of the court.

A good deal of stress was laid upon the fact that at the first meeting of the ratepayers, a majority of those voting approved of the erection of the town hall on lot number nine. It is conceded that there was no legal necessity for taking this vote, and it is affirmed that the state of the roads on the day the vote was taken was such that a considerable number of the ratepayers could not attend, and therefore that a second meeting of the ratepayers was called, when a majority of those who voted approved of another site, no one voting for the first. On this occasion the affidavit states that a violent snow storm kept a great many of the rate-

payers from voting. Then the council resolved to use their own powers, and they passed the by-laws moved against.

We think the repeal of the by-law number ninety-four was not an illegal, that is, not a void act, as contrary to the provisions of the statute or to the common law. Then we have only to enquire whether on any of the objections taken in the rule we can properly deem the proceeding illegal, not because it was *ultra vires*, but because it did a wrong and injury to the municipality or to private individuals, assuming that under such circumstances we have authority to interfere.

The mere change of site is not, as far as we can perceive, any direct loss or injury to the municipality. The conveyance of the first site was gratuitous. The grantor still continues in possession of the half acre conveyed, and does not complain of the late proceeding, but is willing to take a reconveyance of the half acre he gave; and the corporation have passed a by-law authorizing it to be surrendered to him.

The advertising for tenders, the appointing a building committee and a surveyor to superintend the erection, are not shewn to be affected or to have become useless by the change, and assuming that a contract was entered into, it is sworn that it has been abandoned by mutual consent, and the contractor therein is the contractor who has commenced the building on the new site, has executed a considerable portion, nearly half of the work, and has been paid on account about \$450.

On the other hand, if we make this rule absolute we affirm that the town hall must be built on the part of lot number nine conveyed to the corporation. We compel a breach of the present contract, and most probably expose the corporation to an expensive litigation. Either they or the contractor must be the loser if the present proceedings are set aside.

The contest appears to be one of merely personal or local interest, and as the law does not in terms prohibit what has been done, and to undo it would cause great difficulty and

loss, without any counteracting benefit, so far as appears, unless to particular interests, we think we should abstain from interposing. If it rested simply on the grounds of convenience, and the injury to result from overturning what has been done and staying what is in progress, we should find ample authority for withholding our judgment, in the case of the King v. The Justices of Newcastle, (Dra. Rep. 214). But we think there is no sufficient reason for our adopting that course. In our opinion the rule should be discharged with costs.

Rule discharged, with costs.

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DOWKER AND ARMOUR V. THE CANADA LIFE ASSURANCE COMPANY.

*Life insurance—Omission to insert in the policy the name of the person interested—14 Geo. III, ch. 48—Right to recover back premiums.*

A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half-yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife they would hold the insurance money for the survivor and for their children.

*Held*, that such policy was illegal, under 14 Geo. III, ch. 48, sec. 2, for the name of the person interested therein, or on whose account it was made, was not inserted in it *as such*: and the declaration of trust, which shewed that the plaintiffs had no interest, could not be incorporated as part of the policy.

*Held*, also, that the plaintiffs might recover back the premiums, the omission to comply with the statute not being a "*delictum*" on their part, so as to make the maxim "*in pari delicto*," &c., applicable; but that they could recover only the first premium paid, the other payments not appearing upon the evidence to be made by them and their own money.

*Held*, also, that it was unnecessary for the plaintiffs to produce the declaration referred to in the policy as the basis of the contract.

THE declaration contained the common indebitatus counts, to which never indebted was pleaded.

The case was tried in May last, at Lindsay, before *Adam Wilson, J.*

The plaintiffs gave in evidence a policy of assurance, dated 18th of March, 1857, executed by the defendants, in which it was recited that the plaintiffs had proposed to



effect an insurance in the sum of £1000 on the joint lives of Henry Mason and his wife, and had delivered to defendants a declaration in writing, setting forth certain matters, which declaration was the basis of the contract; and reciting the payment to the defendants of £21 16s. 8d. as the first (half-yearly) payment, and that the plaintiffs had agreed to pay the residue, and all future premiums. And the defendants agreed to pay £1000, if the said Mason and his wife, or either of them, should die before the expiration of six months, or if they lived beyond that term, that the plaintiffs should pay the like instalment of £21 16s. 8d. every six months. The policy was subject to certain conditions endorsed thereon. The amount of premiums paid was \$1353 $\frac{58}{100}$ . A declaration of trust was put in evidence, declaring that in case of the death of either Mr. or Mrs. Mason, the plaintiffs would hold the insurance money for the benefit of the survivor, and for the children of Mr. and Mrs. Mason.

The plaintiffs claimed to recover back the money, on the ground that the policy was void, and that they had paid these premiums.

Several objections to the plaintiffs' recovery were taken, which the learned judge overruled, and the plaintiffs had a verdict, with leave to the defendants to move to enter a non-suit.

In Easter term *Sadleir* obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a non-suit entered, pursuant to leave reserved, objecting,

1. That the policy produced referred to a declaration signed by the plaintiffs and Mason and his wife as the basis of the contract, which declaration should have been produced.

2. That there was no evidence besides the policy to shew the terms of the contract, and it should not be presumed that there was no interest in the plaintiffs in the lives of Mason and his wife, or in Mason and his wife in the lives of each other.

3. That Mrs. Mason had an interest in her husband's life, so that the policy was not void *in toto*.

4. The payment of premiums having been made voluntarily, and as the plaintiffs alleged on an illegal contract, cannot be recovered back.

5. There was no evidence to shew by whom the premiums were paid, except as to two receipts, which shewed one payment by Mason and another by Dowker; and as there was no obligation on the part of the plaintiffs to pay the premiums, payment by them would not be presumed:

Or why the verdict should not be reduced to such sum as the court under the evidence should think proper—that is to say, by the amounts shewn to have been paid by Mason and Dowker respectively.

*C. S. Patterson* shewed cause, citing 14 Geo. III. ch. 48; *Hodson v. The Observer Life Assurance Society*, 8 E. & B. 40; *Shilling v. The Accidental Death Insurance Company*, 2 H. & N. 42; *Bunyon on Life Assurance*, 91; *Add. Con.* 33.

*Burton, Q. C.*, supported the rule.

DRAPER, C. J., delivered the judgment of the court.

The plaintiffs seek to recover back the premiums paid by them upon the policy of insurance put in evidence, contending that it is void, as contrary to the statute 14 Geo. III., ch. 48. The jury have found in their favour. The defendants move upon leave reserved to enter a non-suit.

We do not attach any weight to the first objection. It is true that the declaration is stated in the policy to be the basis of the contract, but the plaintiffs are striving to disaffirm the contract, and it is in no way shewn that the declaration has any bearing on the objection taken to the policy. The bare fact that it is referred to in the policy cannot render its production by the plaintiffs necessary; and as the policy states that it was delivered to the defendants, it is to be presumed they have it.

The second objection involves the important question, though perhaps only indirectly. The second section of 14 Geo. III., ch. 48, declares that it shall not be lawful to make any policy on the life of any person, &c., without

inserting in such policy the name of the person interested therein, or for whose use and benefit, or on whose account such policy is made. Admitting for the argument's sake that if the policy alone be regarded it is not to be presumed that the plaintiffs had no interest in the lives of Mason and of his wife, or that Mason and his wife had no interest each in the life of the other, the difficulty is not met; nor even if it be further admitted that on the face of the policy it might be assumed that the plaintiffs had such an interest.

The objection is the want of inserting the name of the person interested, &c. The plaintiffs put in evidence a declaration of trust, executed by themselves, stating that in case of the death of either Mr. or Mrs. Mason they would hold the insurance money for the benefit of the survivors and of their children. By this evidence it was plainly shewn that the plaintiffs themselves had no interest, and that the insurance was in fact for the benefit of the *cestuis que vie* and their children. It was then necessary that their names, at least those of Mr. and Mrs. Mason, should be inserted, and in fact they are both inserted in the policy. But the case of *Hodson v. The Observer Life Assurance Society* (8 E. & B. 40) shews that nevertheless the statute has not been complied with. In that case the plaintiff sued upon a policy made in his own name upon the life of Charlotte Weir, and averred in the declaration that the policy was effected for the use and benefit and on the account of Charlotte Weir. The defendants pleaded that her name was not inserted in the policy as a person for whose use or benefit or on whose account such policy was made, setting out the policy in full, which contained a recital that the plaintiff alleged himself to be interested in the life of Charlotte Weir. The court gave judgment for the defendants on a demurrer to this plea, and *Coleridge J.*, remarked that the statute requires that the name of the person interested shall be inserted in every such policy, "inserted, that is, *as* that of the person interested."

If either Mr. or Mrs. Mason had died and these plaintiffs had brought an action on the policy, we do not see why the defendants might not have succeeded on a plea perfectly



similar, and the reason would be that the omission renders the policy void for want of compliance with the statute.

But it may be urged that the plaintiffs are proved to have effected this insurance as trustees for Mr. and Mrs. Mason, and therefore it is valid, for if that appears Mr. and Mrs. Mason are named in the policy.

In *Collett v. Morrison* (9 Hare 162) Vice Chancellor Sir *George Turner* held that the statute 14 Geo. III. does not prohibit a policy being granted to one person in trust for another, where the names of both parties appear upon the face of the instrument. The circumstances of that case must be examined in order to arrive at the ground of the decision. Certain enquiries to be answered by the party desirous of effecting the insurance formed part of the proposal, and the answers to these formed another part. One enquiry was the name, residence, and description of the party proposing the insurance; and the answer was, "Mrs. Emma Collett, of," &c., "by her trustee W. J. Richardson, of," &c. This proposal was accepted by the directors of the Britannia Assurance Company. Richardson afterwards signed a second proposal, and the answer to the same enquiry was, "W. J. Richardson, of," &c. The policy began thus: "Whereas W. J. Richardson, of, &c., the person assured by this policy, hath agreed to effect an insurance with the Britannia Life Assurance Company, in the sum of £999, on the life of Emma Collett, of," &c., "and hath caused a declaration or statement in writing to be delivered," &c.

Among the conditions endorsed on this policy was one that in every case where any policy issued by the company shall be at the time of issuing the same, or at any time afterwards become subject to any trust whatever, the receipt of the trustee for the time being for the sum assured by such policy shall, notwithstanding any equitable claim or demand whatsoever of the person beneficially entitled to the policy or sum assured thereby, be an efficient discharge to the company.

The Vice-Chancellor held that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form, varying the right of the

party assured, a court of equity will interfere and deal with the case upon the footing of the agreement and not of the policy. And as he was of opinion that the evidence established that the directors of the company accepted the first proposal wholly, he treated the policy as if it had been drawn up in the terms of that proposal—*i. e.*, that Emma Collett insured her own life by her trustee Richardson; and he decreed in favour of the plaintiff, who filed the bill after her death as her personal representative. His decision as to the operation of the statute 14 Geo. III. does not therefore help the policy in this case, which contains not a word to shew that the plaintiffs were trustees, and that it was in fact an insurance for Mr. and Mrs. Mason, made by them by or through the plaintiffs as their trustees. If we were at liberty to treat the declaration of trust as the Vice-Chancellor treated the proposal which had been accepted, and incorporate it as part of the contract of insurance, the policy would no longer be obnoxious to the objection which *Hodson v. The Observer Life Assurance Society* sustains. But in a court of law we cannot rectify the contract, if under the circumstances of the case it would be right to do so.

And though the plaintiffs are seeking to treat the policy as void *ab initio*, and therefore to recover back the premiums, that is nothing to shew that the defendants are seeking to establish it, so as to make it binding on themselves. Indeed one objection urged to the plaintiffs' recovery affirms the plaintiffs' contention that the policy is void, but claims protection under shelter of the maxim, *in pari delicto*, &c. We think this wholly fails. Not only is there nothing to shew that the policy in this case was a gaming or wagering policy; it is not even a case in which none of the parties have no interest in the lives insured. The declaration of trust shews that it was in fact meant to be a policy by Mr. and Mrs. Mason on their joint lives made by their trustees; and the defect in this instance which defeats the policy, is not stating the name or names of Mr. and Mrs. Mason, or either of them, as the person or persons interested in the policy. We do not think this is "*delictum*," so as to entitle the defendants to keep the money they have received from the plaintiffs

without any consideration, under the shelter of the maxim invoked. There has been no *fraud* upon the insurers, nor any commencement of risk.

We think therefore the rule for nonsuit should be discharged. But this is an action for money had and received; the plaintiffs can only recover their own money, the money they have paid; and upon the evidence we cannot see that they have paid more than the sum expressed in the policy, and to that sum, being £21 16s. 8d., the verdict should be reduced, thus making the last part of the rule absolute.

### MILLER V. MCGILL.

*Voluntary conveyance—27 Eliz. ch. 4.—Registration.*

O., requiring money, mortgaged land to B. in 1854, for £50, to enable B. to obtain it for him, which mortgage was registered in the same year. B. having done nothing, O. in 1856, got him to assign the mortgage to S., who paid B. £25, but neglected to register the assignment until 1864. In the meantime O. conveyed, for value, to M., to whom B., for a nominal consideration, conveyed his interest.

*Held*, 1. That the mortgage to B., being voluntary, was void under the 27 Eliz. ch. 4, as against the conveyance for value to M., and that the fact of its being first registered could not affect its validity in this respect. 2. That the assignment by B. to S. was fraudulent and void under the Registry Law as against M., a subsequent purchaser for value who had first registered.

EJECTMENT for lot number 11, in the 5th concession of Sheffield.

The trial took place at Napanee, in March, 1865, before *Adam Wilson, J.*

Both parties derived their title from John Peter O'Rorke, who, by Indenture dated 19th July, 1854, in consideration of £50, conveyed the premises in question, with another lot in the township of Portland, to James Joseph Burrowes, Esquire, in fee, but to secure the payment of £50, and interest, in two years from the date. This was registered as to the premises in question on the 9th of August, 1854.

Both parties admitted, for the purposes of this suit, that Burrowes had a good title under this mortgage.

By deed poll, dated 3rd June, 1856, and written upon the mortgage, Burrowes assigned the "within" indenture of mortgage, and all his interest in the land, money and cove-



nants therein, to the Hon. Benjamin Seymour, his executors, administrators and assigns. This was registered on the 24th of May, 1864.

By indenture, dated 8th of September, 1854, O'Rorke, in consideration of £225, bargained, sold, &c., &c., the land in question to Mitchell Martinell, to hold in fee. This deed was registered on the 15th of September, 1854. It contained full covenants, and Burrowes was one of the subscribing witnesses to it.

By indenture, dated 5th of March, 1859, Burrowes, in consideration of five shillings, gave, granted, bargained, sold, aliened, assigned, transferred, released, enfeoffed, conveyed, and confirmed the premises in question (not the land in Portland) to Mitchell Martinell, to hold in fee. This deed contained no covenants, and was registered on the 20th of March, 1860.

By indenture, dated 16th of March, 1861, Mitchell Martinell, in consideration of a loan, and to secure the re-payment of \$600, conveyed the premises to the Trust and Loan Company of Upper Canada, subject to a proviso for making the same void on re-payment, with interest at eight per cent., in advance, as follows:—\$100 on the 1st of October, 1862, and \$500 on the 1st of October, 1866, and the interest in advance half-yearly, with a power of sale upon any default in payment of principal or interest. This was registered on the 26th of March, 1861.

It was admitted that on the date of this mortgage the Trust and Loan Company had no notice of the assignment made by Burrowes to Seymour.

By indenture, dated the 9th of May, 1864, the Trust and Loan Company, under the power of sale, in consideration of \$940, granted, bargained, sold, and assigned to the plaintiff in fee the said lot of land in Sheffield, being the premises in question in this suit.

Mr. Burrowes was called as a witness for the defendant. He stated that O'Rorke was a borrower, in 1851, from the Kingston Building Society, and wished Mr. Burrowes, who was their solicitor, to raise £50 more from that society on the same land. This was not done; and then O'Rorke

executed the mortgage of the 19th of July, 1854, to Mr. Burrowes, who did not advance any of the money, but only undertook to try to raise it for O'Rorke. After this O'Rorke himself negotiated with Mr. Seymour, undertaking that Burrowes should assign this mortgage to him. Seymour paid only £25 (not £50) to Burrowes, who assigned the mortgage, which included these premises in Sheffield and a lot in Portland, to Seymour. Mr. Burrowes stated that he had no interest of any kind in the transaction. In 1859, Burrowes was applied to to execute a quit claim of any title that might be in him in favour of Martinell, who had bought the premises from O'Rorke, and had taken from him the deed of the 8th of September, 1854, and Burrowes, telling Martinell or Mr. Cartwright, who applied on his behalf, that he (Burrowes) had no interest, executed the deed to Martinell, of the 6th of March, 1859, not knowing then that Seymour had neglected to register the assignment of the mortgage for £50. Mr. Burrowes stated that from what he himself learned afterwards—namely, that the assignment to Seymour was not registered,—he supposed that Mr. Cartwright did not know anything about this assignment.

It was also proved that the Trust and Loan Company disposed of this land by public sale, on the 9th of May, 1864, at which a notice on behalf of Mr. Seymour was read, informing all intending purchasers that he held an unregistered assignment of mortgage on the said lot from J. B. Burrowes, Esquire, dated the 3rd of June, 1856, and that any quit claim or deed from said Burrowes to R. J. Cartwright, Esquire, or to any other person, if without valuable consideration would be inoperative as against that assignment. The plaintiff bought at the sale with full notice of Mr. Seymour's claim. It was endeavoured, in cross-examination of the plaintiff's witness, to shew that the plaintiff bought for some other party, either the Trust and Loan Company or Mr. Cartwright, but it was not proved, though it came out that the plaintiff had given a mortgage to the Trust and Loan Company for his purchase.

On this evidence the learned Judge recommended a verdict for the defendant, not however expressing any

opinion, but reserving leave to the plaintiff to move to enter the verdict for him, if the court should be of opinion that, on the admissions and evidence, he was entitled to recover.

In Easter Term, *S. Richards, Q. C.*, obtained a rule calling on the defendant to shew cause why the verdict should not be entered for the plaintiff pursuant to leave reserved, or why there should not be a new trial, the verdict being against law and evidence, on the ground that the plaintiff proved a legal title: that the mortgage to Burrowes was void as against Martinell, who was a purchaser for value, as there was no value or consideration for the mortgage: that the deed from Burrowes to Martinell was registered before that from Burrowes to Seymour, and was therefore entitled to prevail over it: that the Trust and Loan Company and the plaintiff were purchasers for value, and the mortgage from O'Rorke to Burrowes, and the assignment from Burrowes to Seymour, were both voluntary and without consideration, and therefore the plaintiff's title should prevail: that as against the Trust and Loan Company the assignment by Burrowes to Seymour was void, as they (the Trust and Loan Company and plaintiff) were purchasers for value without notice, by reason of the non-registration of the assignment until the 14th day of May, 1864. He cited *Doe Nellis v. Matlock*, 2 O. S. 487; *Doe Matlock v. Disher*, 4 U. C. R. 14; *Doe Prince v. Girty*, 9 U. C. R. 41.

In the following term Sir *H. Smith, Q. C.*, shewed cause, and cited *Doe Cronk v. Smith*, 7 U. C. R. 376; *Doe Major v. Reynolds*, 2 U. C. R. 311.

DRAPER, C. J., delivered the judgment of the court.

In my opinion as against Martinell, who on the 8th of September, 1854, purchased from O'Rorke for valuable consideration, the mortgage of the 19th of July preceding, given by O'Rorke to Burrowes, must be adjudged fraudulent and void. It was a mere voluntary conveyance, under which Burrowes became a trustee for O'Rorke to raise money, which he did not do, and in June, 1856, more than twenty months after Martinell's conveyance from O'Rorke



was registered, O'Rorke himself negotiates with Seymour, who obtains from Burrowes an assignment of the mortgage.

The registry act, though operating to give notice of the mortgage to Burrowes, does not affect the actual character and intrinsic validity of that instrument. Registration will not give *bonâ fides* to a transaction which the law declares to be fraudulent, or supply a want of valuable consideration. This mortgage was not the less voluntary because registered before the deed of the 8th of September, 1854, and the execution of that conveyance, which was for value, made the voluntary deed void under the 27 Eliz. ch. 4, though Martinell, owing to the registration, may be deemed to have had notice of it. See Twine's case, 1 Smith, L. C. 1-13. This objection, however, though taken in the rule, was not pressed as much as that under the registry act; indeed the defendant's counsel did not to my recollection advert to it.

The second objection is under the Consolidated Statutes of Upper Canada, ch. 89, the act respecting registration of deeds, &c. The 53rd section, on which the question turns, was altered by the 24 Vic. ch. 41, sec. 7, sub-sec. 6, which took effect on the 1st of September, 1861. It reads thus: "After any grant from the Crown of lands in Upper Canada, and letters patent thereof issued, every deed, devise, or other conveyance executed after the 1st of January, 1861, whereby the said lands, tenements, or hereditaments, may be in anywise affected in law or equity, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deed, devise, or conveyance be registered as by this act is specified before the registering of the memorial of the deed, devise, or conveyance, under which such subsequent purchaser or mortgagee claims."

No doubt has been suggested on either side that the land in question was granted by the Crown, and the deed to Burrowes having been registered all subsequent conveyances came within this act. Now, so far as that mortgage is concerned, and for the purposes of this argument assuming its validity, it is the earliest of all the deeds brought before us, both in point of date and of registration, and both the plaintiff and the defendant claim through it. The plaintiff's

case is, that Martinell got a conveyance of the legal estate from Burrowes, having previously purchased the equity of redemption from O'Rorke, and that the Trust and Loan Company acquired the land from Martinell for valuable consideration: that all these deeds were registered before the assignment of the mortgage from Burrowes to Seymour was registered: that as against them the assignment to Seymour was, by the express language of the statute, fraudulent and void, and that he, the plaintiff, is also a purchaser for value, and though he had notice of the unregistered assignment, yet, in a court of law at all events, the assignment is also fraudulent and void against him.

And so it appears to me. Burrowes conveys to Seymour, who delays to register. Afterwards Burrowes conveys to Martinell, though not for value; and he, before Seymour registers, conveys for a valuable consideration to a party who sells and conveys to the plaintiff for value. I cannot see any ground for doubting that this case falls both within the letter and the spirit of the act. We must adjudge the assignment to Seymour to be fraudulent and void as against the Trust and Loan Company, and consequently as against the plaintiff.

The rule to enter the verdict for the plaintiff must therefore be made absolute.

Rule absolute.

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### THE CORPORATION OF LONGUEUIL V. CUSHMAN.

#### *New trial—Practice.*

Where a plaintiff is disappointed in procuring testimony he should withdraw his record or take a nonsuit, and a defendant in the like case should apply for a postponement. If instead of doing so he chooses to go to trial upon weak or insufficient evidence, he will not be relieved from an adverse verdict.

In applying for a new trial for the discovery of new evidence, the nature of such evidence must be stated.

This was an action on a bond given by defendant as township treasurer, conditioned for his duly paying over all moneys coming to his hand as treasurer, and for the due performance of his duties, assigning breaches of non-payment to plaintiff of moneys payable to them.

*Pleas*, averring due performance of his duty as treasurer

as to the custody and paying over of moneys, and denying any demand on him by plaintiffs, &c.

The trial took place before *Morrison, J.*, at L'Original. .

The collector proved certain payments to defendant, and that he had given him the collector's rolls for 1863 and 1864. Other payments were proved to have been made to and by him. Witnesses were called for the defence, and on the evidence the jury found for the defendant.

In Easter term *Hector Cameron* obtained a rule, calling on defendant to shew cause why there should not be a new trial, on the ground that defendant's failure to attend as a witness pursuant to notice, and to produce rolls and documents, &c., prevented the plaintiffs from proving the amount of moneys received by defendant, and on the discovery of fresh evidence described in affidavit filed, shewing that the defendant was indebted to the plaintiffs, and that the verdict was unjust and against the evidence, as appears by affidavit filed.

The only affidavit filed was that of Mr. Grant, town reeve. He swore that at and previous to the 3rd of February, 1864, defendant was treasurer, and by an account made out and furnished by him to the plaintiffs he on that day owed the plaintiffs \$595: that the bond was given on the 5th of February, 1864, or two days after: that defendant having been subsequent to the execution of the bond applied to to pay over all moneys received by him as treasurer, and he having failed to do so, this action was commenced to recover moneys believed to be received by him after execution of the bond: that before the trial it was found that the collector's rolls had been handed over to defendant, and duplicates thereof were also retained by him, as also evidences of payments made to him on the Clergy Reserve and other funds: that due notice to produce was duly served on defendant's attorney, and also for defendant to attend as a witness, in order to ascertain the true amount due: that at the trial defendant did not attend, having been taken ill a couple of days before trial, nor were the documents, &c., produced: that under such circumstances the plaintiffs were only able to prove payments to defendant to \$490, and as he proved payments



exceeding the same the jury found for him : that since the rendering of the verdict evidence had been discovered which deponent believed would shew further moneys received by defendant to \$400, and which deponent believes will establish a debt by defendant to plaintiffs, allowing him all orders proved by him at the trial : that had the evidence been discovered before the trial, before it was found that defendant was too ill to attend, deponent believed the verdict would have been for the plaintiffs, but it was not discovered till after the rendering of the verdict.

*S. Richards*, Q. C., shewed cause, and objected to the insufficiency of the grounds suggested for a new trial.

*Moss* supported the rule.

HAGARTY, J.—As reported to us, no application was made by the plaintiffs to put off or postpone the trial, nor to take the case *pro confesso* as against defendant for his non-appearance, nor to give any secondary evidence of the contents of the rolls or papers which he is said to have been notified to produce, nor is it shewn whether the plaintiffs were aware of defendant's inability to attend before the jury were sworn.

As far as we we can judge, it appears that they determined to risk the opinion of the jury on the evidence which they had ready, and of the insufficiency of which they could not but be aware.

The affidavit filed is open to the gravest objections. It speaks of the discovery of fresh evidence, but discloses nothing of the nature thereof, or of the witnesses from whom it is expected. It does not profess to explain why the case was left to the jury on insufficient testimony.

It has, we think, for a long series of years been the practice of this court, and, with far greater strictness, of the courts in England, to discourage parties from risking cases at *Nisi Prius* on insufficient evidence, in the hope that if the result be unfavourable the court will grant a new trial.

If a plaintiff finds that he is disappointed in procuring certain evidence, he should withdraw his record, or take a nonsuit ; if a defendant be in like case he should apply for a postponement : neither is to speculate on the chance of a new trial being granted.

If fresh evidence be discovered since the trial, we understand the nature of such evidence must be stated; it is not sufficient to aver generally the fact that fresh evidence is discovered.

In the late cases of *Vidal v. The Bank of Upper Canada* (ante p. 430, 15 C. P. 423,) both our courts take occasion to recognise the practice as well settled.

We can see no sound distinction between an application of this kind made by a plaintiff or by a defendant, nor was any such suggested to us. It is to the general interest that litigation should not be needlessly protracted: that parties preparing for trial should use every reasonable exertion to be fully prepared. Courts are always ready to relieve parties who, having been reasonably careful, are by some unforeseen casualty prevented from presenting their case fairly to a jury. But the absence of evidence known to be necessary, and known not to be forthcoming; cannot, we think, be urged by parties as a reason for a new trial, after voluntarily taking the chance of what a jury might think of their case, knowing the same to be defective.

We fear that the language of the Court of Common Pleas, in *Regina v. Baker*, (6 C. P. 70)—“We cannot help people who will not help themselves, or who choose to neglect proper precautions, and omit to bestow proper attention on the conduct of their business,”—is applicable to the case before us.

It may be that this defendant really owes money to the plaintiffs. If so, it is a matter to be regretted that they have not recovered it. But it would be still more unfortunate if we were to break through rules manifestly calculated to ensure the proper conduct of trials at *Nisi Prius*, and of long tried practical usefulness. We cannot extend this indulgence to the corporation of Longueuil without departing from these rules, and establishing a precedent which must be found embarrassing in future cases.

MORRISON, J., concurred.

THE CHIEF JUSTICE, having been absent during the argument, took no part in the judgment.

Rule discharged.

VOL. XXIV.

## THE QUEEN V. COWAN.

*Election under the Municipal Act—Commencement of—Perjury.*

An Election, under the Municipal Act, is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded.

Where therefore, in an indictment for perjury, the defendant was alleged to have sworn that no notice of the disqualification of a candidate for township councillor had been given previous to or at the time of holding the election, the perjury assigned being that such notice had been given *previous to* the election; and the notice appeared to have been given on the nomination of the candidate objected to: *Held*, that the assignment was not proved.

PERJURY.—The indictment set out the holding of an election for a township councillor, where one Thurston and one Sherriff were candidates: an application in the nature of a *quo warranto* at Thurston's relation before a county court judge, complaining that Sherriff was not duly elected, on several grounds: that the *quo warranto* summons was issued to try the question: that the defendant made an affidavit, in which he swore, "that previous to the said election for a township councillor for said ward number three, for said township, nor at the time of holding the said election of township councillor, on the second and third days of January last, it had not been publicly announced, nor was any general public notice given to the municipal electors or voters of and for said ward, according to the last revised assessment roll for the said township, by the said Jabez Thurston, or his agents, or others interested in the said election, that the said Thomas Sherriff was disqualified according to law to fill, hold or exercise the said office of township councillor, nor was the nature of the alleged disqualification of the said Thomas Sherriff publicly announced, or generally made publicly known to the electors by a public notice, or otherwise, through the said ward, at or before the holding of the said election," &c.

The alleged perjury was thus assigned: "Whereas in truth and in fact that previous to the said election for a township councillor for said ward number three, for the said township, on the said second day of January last, it had been publicly announced, and general public notice had been



given to the municipal electors and voters of and for the said ward number three, by the said Jabez Thurston, that the said Thomas Sherriff was disqualified according to law to fill, hold or execute the said office of township councillor." There was a second assignment, on which the defendant was acquitted.

At the trial, before *Adam Wilson, J.*, at Lindsay, it appeared that Sheriff and Thurston were nominated as candidates on the day of election, and on Sherriff being nominated Thurston publicly objected to him as disqualified under the statute, as holding a contract under the municipality, and warned the ratepayers present that they would throw away their votes if they voted for him.

The returning officer proved that he was then requested to note the objection in his book, which he did in his poll-book. A discussion arose about this objection, lasting nearly an hour, before any polling took place. Voting then began, and Sherriff had the majority. It appeared that the returning officer entered the names of the proposers and seconders of each candidate, as and when they made or seconded each nomination.

It seemed clear, on the whole evidence, that it was upon Sherriff being nominated as a candidate the objection was made to the returning officer and notice given to the electors.

*Hector Cameron*, for defendant, objected (amongst other things) that the assignment of perjury was not proved: that such notice as was given was not previous to the election as averred, but after the election was commenced.

The learned judge ruled that the election began when the voters were called on to express their election, and that appeared in this case to have been the time they began to vote; and he overruled the objection.

The defendant was convicted on this assignment of perjury.

In Easter Term *Hector Cameron* obtained a rule for a new trial, for misdirection, in ruling that the assignment was supported or proved by the evidence, and that public

notice of the disqualification had been given previous to the election, whereas no such notice had been given at all, or at any rate not till after the election had commenced, and the candidates had been nominated and votes recorded; and because the verdict was against law and evidence.

In this Term, *Robert A. Harrison*, for the Crown, shewed cause, citing 1 Hawk. P. C. ch. 69, sec. 6; Consol. Stat. U. C. ch. 54, sec. 97; *Regina v. Smith*, 1 F. & F. 98; *Regina v. Southwood*, *Ib.* 356.

*Moss* supported the rule, citing *Russell on Crimes*, II., 666.

HAGARTY, J.—We have to consider whether this notice of Sherrieff's disqualification was given previous to the election or not.

We confine ourselves wholly to the assignment of perjury on which the defendant has been convicted, without considering the wider statements in defendant's affidavit. What is the election, and when can it be said to commence?

Our Municipal Act, sec. 90, directs the appointment of a returning officer.

He is to give ten days' notice of the election to be held by him.—Sec. 97, sub-sec. 1.

He "*shall commence every election at ten of the clock in the forenoon.*"—Sub-sec. 6.

He shall provide a poll-book, and at every election at which a poll is demanded, he shall enter in his poll-book, &c., the names of the candidates proposed and seconded by any electors present at the election, and shall write the names of the electors offering to vote at the election, &c., &c.

He "*may close the election in one hour after commencing the same,*"—Sub-sec. 7,—if within that time no more candidates are proposed than by his writ he is to return; but in case there are more candidates and a poll is demanded, he shall keep open the election until four o'clock, &c., &c.

Section 94 provides, if the returning officer be absent, &c., at the time appointed, the electors present at the place for holding the election may choose from amongst themselves a returning officer, who shall have all the powers and proceed to hold the election, &c.

By section 95, the returning officer shall during the election act as a conservator of the peace, &c., &c., and may summarily try and punish any person assaulting, &c., any voters coming to vote, &c.

It appears to us that, under our Municipal Act, the election is commenced at all events by the returning officer at the hour named in the statute proceeding to business by receiving the nomination of candidates, and that the proceeding must be considered an election, or rather part of the action of an election, whether a poll is demanded or not. We think when a candidate is duly proposed, and his qualification then objected to, and notice of his disqualification then given to the electors present, such objection and such notice can hardly be said to have been given previous to the election; or, in the words of this assignment, "that previous to the said election for a township councillor for said ward, &c., on the said second day of January last, it had been publicly announced, and general public notice had been given to the municipal electors by the said Thurston, that the said Sherrieff was disqualified," &c.

The ordinary meaning attachable to these words would, we think, be a public notice given not during the progress of the election, but prior to the holding thereof.

We think the election was being held, was actually in progress, when the objection was first made.

It may be urged that the word "election" means "a choice," and that till there is a choice there is no election. We must construe the expression by the light of the statute, and we think throughout the various provisions "election" is treated as a rather extensive term, involving all the necessary process from the appearance of the returning officer with his poll-book at the appointed hour and place, and the commencement of the proceedings under the statute, till the closing of the poll. As the act says, "The returning officer *shall commence the election at ten o'clock.*"

There can be an election without any voting or contest. There may be a nomination of candidates; an objection may be made to one, and he may yield to it and withdraw, and the other person nominated may be declared duly elected,



without any votes being taken or recorded. This would be an election under the statute. We should not in such a case consider that the objection was made previous to the election, but during the election.

We think the powers given to the returning officer to preserve the peace could be exercised by him at once on his commencing to act at the proper hour, without waiting for actual voting.

As our view is based wholly on the language of our municipal act, it is unnecessary to review the English cases bearing on the general question.

We think the objection should not have been overruled, and that the verdict must be set aside and a new trial had.

The jury in finding a verdict of guilty must, we think, have adopted a view different from that now expressed by us.

MORRISON, J., concurred.

The CHIEF JUSTICE, having been absent during the argument, took no part in the judgment.

Rule absolute.

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### REID V. MILLER.

#### *Lands—Liability of for debts.*

The liability of lands for debts under 5 Geo. II. ch. 7, is not affected by the death of the debtor. He, or his heir or devisee after his death, may sell and convey to a *bonâ fide* purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against lands issued upon it; and such purchaser will have a good title as against creditors.

Levisconte v. Dorland, 17 U. C. R. 437, remarked upon.

EJECTMENT for the south half of lot number 19, in the fourth concession of the township of Grantham.

The case was tried at Niagara, in April, 1865, before *Draper, C. J.* The parties agreed upon the following facts:

That lot number 19, in the 4th concession of Grantham was granted by the Crown, on the 8th of June, 1799, to one Wm. May, in fee: that William May died previous to the 21st of September, 1831, having on the 23rd of April, 1823,

first duly executed his last will and testament, by which he devised the said lot to one Peter May in fee. This will was duly registered on the 21st of September, 1831. Peter May died intestate previous to the 6th of March, 1835, leaving William H. May, his eldest son and heir-at-law, him surviving, who, on the 6th of March, 1835, for a valuable consideration, by deed, granted, bargained and sold the said lot to Christian May in fee, which deed was duly registered on the 12th of October, 1836 :

That Christian May, for valuable consideration, by deed dated the 4th of November, 1835, granted, bargained and sold the south half of said lot to George Rykert in fee, which deed was duly registered on the 7th of September, 1837 :

That George Rykert died in November, 1857, seised in fee simple of the said south half, and left surviving him his only children and heirs-at-law, George Z. Rykert, John C. Rykert, and Alfred E. Rykert, having first made his last will and testament, the probate of which was to be put in by the plaintiff :

That after the death of the said George Rykert, his three sons, as co-heirs, agreed upon a division or settlement between them of the estate and property which had been of their father ; and the premises in question in this suit, with other property, fell to the said John C. Rykert, he having purchased for a valuable consideration the share of his brother Alfred in the said estate ; and that in pursuance of such agreement, and to carry it into effect, they joined and executed a deed of bargain and sale, dated the 24th of April, 1858, in favour of one James McCaughey and his heirs, whereby the premises in question, with other property, were conveyed to the said James McCaughey, which deed was duly registered on the 16th of June, 1858 :

That James McCaughey, in pursuance of said agreement, by deed, dated the 24th of April, 1858, conveyed the premises in question, with other property, to the said John C. Rykert in fee, which deed was duly registered on the 20th of April, 1859 :

That John Charles Rykert, being in possession of the

premises in question, for valuable consideration, by deed bearing date the 19th of April, 1859, conveyed the same to Elijah Parnall, in fee, which deed was duly registered on the 20th of April, 1859 :

That Elijah Parnall being then in possession of the premises, by deed of bargain and sale, by way of mortgage, dated the 1st of August, 1859, in consideration of \$600, conveyed the said premises to Thomas Burns in fee, with a condition to be void on payment by the said Parnall of \$600 at the expiration of three years from the date of the mortgage, with interest : that the mortgage was duly registered on the 3rd of August, 1859, and Parnall had not paid the said sum of \$600 and interest, or any part thereof :

That Parnall, by deed of bargain and sale by way of mortgage, dated the 4th of March, 1861, conveyed to Ralph M. Crysler and Elias Durham in fee, the same premises, with a condition to be void on payment of \$400, with interest, at the expiration of three years from the date of the said deed, which deed was duly registered on the 10th day of April, 1861, and Parnall had not paid the \$400 and interest, or any part thereof :

That Crysler and Durham, for valuable consideration, by deed dated the 2nd of October, 1862, granted, bargained and sold all their right and title in and to the premises to the said Thomas Burns in fee, which deed was duly registered on the 4th of October, 1862 :

That on the 18th of January, 1864, Thomas Burns, in consideration of £1050, by deed, granted, bargained and sold the same premises to the defendant in fee, which deed was duly registered on the 22nd of January, 1864 :

The deed from Joseph A. Woodruff, Esq., as sheriff of the county of Lincoln, dated the 18th of January, 1864, and duly registered on the 22nd of January, 1864, in favour of the defendants, was admitted, and also the facts therein stated. The deed was to be produced by the defendant :

That before and at the time of the death of the said George Rykert, he was indebted to one William Reid in the sum of £1060, upon a promissory note for that amount,



dated the 19th of December, 1856, made by the said George C. Rykert, John C. Rykert, and one Rolland McDonald, payable to the said William Reid, or order, one year after date, and was also indebted to one Walter Reid in the sum of £530, on a promissory note made himself and the said John C. Rykert and Rolland McDonald, on the 19th of December, 1856, payable to Walter Reid or order, one year after date, both of which notes were endorsed to one William McGhee after the death of the said George Rykert :

That McGhee, on the 3rd of September, 1862 commenced an action in the Queen's Bench against one Anna Maria Rykert, as executrix, and John C. Rykert, and George Z. Rykert, as executors of the will of the said George Rykert, to recover the said debt, and on the 29th of the said month of September recovered judgment in the said action against the defendants, as executrix and executors of George Rykert, for the said debt and costs, amounting to £2007 16s. 4d., and on the same day issued a *fi. fa.* against the goods and chattels which were of the said George Rykert at the time of his death in the hands of his executrix and executors to be administered, which writ was returned *nulla bona* ; and on the 4th of October, 1862, an execution issued against the lands and tenements which were of the said George Rykert at the time of his death, which was delivered to the sheriff on the 7th of October, 1862 :

That the sheriff, after duly advertising, sold, and the plaintiff purchased the premises in question in this suit, and the sheriff executed a deed in favour of the plaintiff for the same premises :

That the defendant, at the time of purchasing the lands at sheriff's sale, had notice of the said judgment and execution, said purchase being after the sale to the plaintiff :

That probate of the last will and testament of the said George Rykert issued on the 22nd of April, 1864, and was registered on the 5th of January, 1865.

The plaintiff, in addition to the facts thus admitted, called John Charles Rykert as a witness, and by him proved that a partition was made between the heirs of the late George Rykert, according to the terms of his will, between the

witness and his two brothers, who were also co-heirs : that the witness bought his brother Alfred's interest before the partition, and he had Alfred's interest conveyed to him : that he was satisfied Thomas Burns must have known of the notes upon which judgment was recovered, and the sheriff's sale made under which the plaintiff claimed : that by the division made the witness got the homestead, which was included in the deed to him. The will made a different disposition of the homestead. The witness repeated that he was satisfied Burns knew of the large note : that he was himself a joint maker, and had paid a large portion of it.

The patent from the Crown, granting the premises, was produced, and also the sheriff's deed to the defendant, by which it appeared that the sale was made by the sheriff on the 18th of January, 1864, on an execution against the lands of Elijah Parnall and John Charles Rykert, received by the sheriff on the 23rd of December, 1862 : that this sale was duly advertised, and that the consideration for this sale to the sheriff was £250.

On all the foregoing facts, which were admitted, the jury were directed to find for the defendants, leave being reserved by consent for the plaintiff to move to enter the verdict for himself.

In Easter Term *W. Eccles* obtained a rule *nisi* to enter the verdict for the plaintiff, pursuant to the leave reserved.

In this term *S. Richards*, Q. C., and *Atkinson* shewed cause. *Robert A. Harrison* supported the rule.

The authorities cited are referred to in the judgments.

DRAPER, C. J.—For the purpose of determining the question argued before us, the case may be greatly condensed. The Crown granted the premises in question in fee in 1799, and by various *mesne* deeds and conveyances, all duly registered, the title became vested in George Rykert, who died seised thereof in November, 1857. He left a will, the probate of which was not granted until the 22nd of April, 1864, and which probate was registered on the 5th of January, 1865.

George Rykert left three sons surviving him, viz., George, John Charles, and Alfred, who were their father's co-heirs. They made an agreement between themselves for the division of their father's estate, apparently not in compliance with the disposition as made by the will, between them. In order to effectuate their agreement, they joined in conveying the whole estate to a third person; and he, for the same purpose of giving effect to the agreement, conveyed the premises in question to John Charles Rykert in fee, by deed dated the 24th of April, 1858. John C. Rykert being in possession, by deed dated the 19th of April, 1859, for valuable consideration, conveyed in fee to Elijah Parnall, and he being in possession, by deed dated the 1st of August, 1859, mortgaged the premises in fee to Thomas Burns, to secure payment to him of \$600, which he owed to Burns, with interest. And by deed, dated the 4th of March, 1861, Parnall mortgaged the same premises to Crysler and Durham, to secure \$400 with interest, which sum he owed to them. By deed dated the 2nd of October, 1862, Crysler and Durham conveyed and assigned their mortgage to Burns; and by deed dated the 18th of January, 1864, Burns conveyed and assigned the premises to the defendant. On the same 18th of January, 1864, the sheriff of Lincoln, for a consideration of \$1000, sold and conveyed the premises to the defendant in fee. In this deed it was set forth, and the parties to this suit admitted it to be true, that the sheriff sold under an execution then in his hands against the lands of Elijah Parnall and John C. Rykert. All the deeds made since the death of George Rykert were duly registered.

At the time of his death, George Rykert was indebted on two promissory notes, one for £1060, and the other for £530, both made by him jointly with his son John Charles and a third party, dated the 19th of December, 1856, and payable one year after date. The holder of these notes, on the 3rd of September, 1862, commenced an action against the executrix and executors of George Rykert, and on the 29th of the same month recovered judgment, and issued execution against the goods which were of the testator, which was returned *nulla bona*; and on the 4th of October,



1862, issued execution against these lands, on which the sheriff afterwards sold the premises, and conveyed them in pursuance of the sale to the plaintiff.

When Burns took the mortgage from Parnall, he had notice of the note for £1060.

The plaintiff's argument was rested upon the statute 3 & 4 Wm. & M. ch. 14., and upon the 5 Geo. II. ch. 7, which last it was insisted extended to *all* debts the principle established by the former act as to specialty debts; and it was urged that the lands of a deceased debtor should by force of these acts be held to be so liable to and chargeable with *all* his just debts, as to enable the creditor, on obtaining judgment against the personal representative of such debtor, to take and sell his lands on an execution, although the heir of the devisee of the debtor had, even before the recovery of such judgment, sold them for valuable consideration to a purchaser who had no notice of the debt.

It is clear that during the lifetime of the debtor his lands are not bound by the *debt*, though liable to its satisfaction, and chargeable with it by judgment and execution. In *Doe McIntosh v. McDonell* (4 O. S. 195), it was treated as a settled point, that lands are not bound under the 5 Geo. II., until the delivery to the sheriff of a writ against lands. Mr. Justice Sherwood read an unreported judgment given previously by him in a case of *Doe dem. Clarke v. Updegrave*, in which he concluded that "the words of the 5 Geo. II., and all legal inferences fairly drawn from its enactments, clearly prove that real estates are bound by the delivery of the writ of *fi. fa.* against them to the sheriff, precisely like goods and chattels, and that they are not bound by the judgment under that act for the purpose of sale, as they are by the laws of England for the purposes of extent under the statute of Westminster 2nd."

Whatever doubts may have existed in the minds of individual judges, I believe the law thus settled has ever since been acted upon. The debtor has been considered competent to sell his lands, notwithstanding judgment recovered against him. His devise of them will pass the estate, which if he die intestate will descend to his heirs. The doctrine

contended for by the plaintiff's counsel would prevent the heir or devisee from selling, or rather from conveying a good title, so long as there was a debt of the ancestor unpaid, though no judgment had been recovered or even an action commenced.

The law does not so fetter an executor, however numerous the debts owing by his testator. He not only can convert the whole personal estate into money, but it is his duty to do so in order to pay the debts. He is not compelled by the force of law to stand idle until a creditor recovers judgment, and issues execution. His powers enable him to take measures to save the estate, by a prompt administration of it under certain rules. This authority, however, does not extend over lands. If there be no sufficient means in the executor's hands to pay debts, all having been exhausted in a due course of administration, and notwithstanding that there is not the slightest ground for supposing that the executor will ever have any further assets which he must administer, the creditor by simple contract of the testator must sue the executor, for he can in that way only reach the testator's lands. *Forsyth v. Hall* (Dra. Rep. 291), expressly decided that he cannot, under such circumstances, sue the heir, who need have no notice, and cannot intervene in the action. The executor, under such circumstances, pleads only *plene administravit*, and it was for some time held that to this plea it was allowable to reply that the testator had lands; a replication which, if true, entitled the plaintiff to judgment against the executor, and to execution against the lands. Even if a debtor dies intestate, leaving no personal estate whatever, still an administrator must be appointed, in order that there may be a defendant against whom the creditor can get judgment and obtain an execution against lands, for neither an executor or administrator can sell them, nor according to the plaintiff's contention can the heir, except subject to be afterwards sold in execution to satisfy the ancestor's simple contract debts.

The question is not, however, new in our courts. In *Levisconte v. Dorland* (17 U. C. R. 441), it was discussed; and Sir J. B. Robinson, C.J., expressed his opinion upon it.

The case merits a careful consideration. It was an action against the administrator of Enoch Dorland, on a simple contract debt of the intestate. The defendant pleaded *plene administravit*, to which the plaintiff, admitting the truth of the plea, replied that the intestate died seised of real estate. The defendant rejoined, admitting that the intestate died seised of certain land, but that one S. D., who was his father and heir-at-law, for valuable consideration, conveyed to the defendant by deed all the right which, as heir-at-law, he then had: that at the time of the death of the intestate, one H. held a mortgage on the said lands to secure a sum of £500, being the full value of the land; and the defendant, solely to prevent costs accruing against the estate of the intestate, and for no other consideration, conveyed by deed the equity of redemption which he held under the deed from S. D. of the said lands, which were all the real estate whereof the intestate died seised.

The court, consisting of Sir *J. B. Robinson*, C.J., *McLean* and *Burns*, J. J., held the rejoinder bad. The Chief Justice said, "The plaintiff is entitled to his execution against the estate of which Enoch Dorland died seised upon this judgment against his administrator, according to the decision in *Gardiner v. Gardiner*. \* \* \* The heir of Enoch Dorland could not by his conveyance to the defendant prevent the creditors of Enoch Dorland from having their debts satisfied out of the real estate." The decision is however, at the conclusion, rested on this ground, "the plaintiff having admitted that the goods have been fully administered, only desires judgment in order that he may have execution against the lands of which Enoch Dorland died seised, and the defendant as administrator cannot obstruct him in obtaining such execution, and has no interest in the question whether there are lands or not."

I fully concur in both these last propositions, though the conclusion I should have deduced from them is, as I had previously said in *Sickles v. Asselstine* (10 U. C. R. 203), that the plaintiff was wrong in his replication; and I should only have thought the defendant entitled to judgment, not for the goodness of the rejoinder, but for the



fault of the replication; and as to the replication, such appears to have been the opinion of *Burns, J.*, from what he says in giving judgment. I think, however, the judgment for the plaintiff may be sustained, on the ground that there is nothing in the rejoinder to shew that the conveyance made by the heir of Enoch Dorland was executed before the *fi. fa.* against the lands was placed in the sheriff's hands. *Gardiner v. Gardiner* had conclusively settled that lands could be reached through a judgment against the executor or administrator, and though I have never felt the force of the reasoning on which it is founded, I have always treated it as settling the question. The impropriety of the replication in *Levisconte v. Dorland*, has been distinctly adjudged;—see *Hogan v. Morrissy*, (14 C. P. 441); and *Seaton v. Taylor*, (3 U. C. R. 303); and *Sickles v. Asselstine*, (10 U. C. R. 203,) must be considered to be overruled. As to *Gardiner v. Gardiner*, it is deprived of some of the weight which it might otherwise possess, by the (to my mind) very satisfactory judgment of Sir *J. T. Coleridge*, in the Privy Council in the case of *Bullen v. A'Beckett*, (1 Moore, P. C. C., N. S., 223).

If indeed the necessary consequence of the decision in *Gardiner v. Gardiner* was, that the land of which a debtor by simple contract died seised was liable for the satisfaction of that debt, no matter into whose hands it might pass, even those of a purchaser for full value and without notice, we must yield, and leave to the legislature to say whether the law should remain upon that footing, or whether it would not be advisable and even just to change it by an enactment of a similar character to the English statute 3 & 4 Wm. IV., ch. 104, which enacts that the real estate of a deceased person not charged by will or devised for the payment of debts *shall be assets* to be administered in equity for payment of his debts, whether due on specialty or by simple contract.

This statute was considered and expounded by the Master of the Rolls, in *Kinderly v. Jervis* (22 Beav. 22.), and there is so much force in his observations, and they so pointedly answer some of the arguments urged for the plaintiff, that I cannot forbear repeating them here, after premising that

there is a strong affinity, both in object and in language, between that statute and the act 5 Geo. II.

Sir J. Romilly says, "It was not the object, nor is it the operation, of this statute to make the simple contract debts of a deceased person in the nature of mortgages or specific charge on his real estate, but as the statute makes the lands *assets* for the payment of his debts, these debts constitute a general charge upon them, but not so as that a *bonâ fide* purchaser of the lands from the heir or devisee is bound to see to the application of the purchase money, as he would be in the case of a particular mortgage on any portion of the lands themselves." And he concludes, "Such assets are liable in the first place to pay the debts of the deceased debtor, and subject thereto they belong to his devisee or heir at law, but that the devisee or heir at law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor."

But for the decision in *Forsyth v. Hall*, it might have been thought that the creditor's remedy, under the statute 5 Geo. II., was at law, to get satisfaction from the heir or devisee of his debtor by simple contract. Whether in consequence of that decision the Court of Chancery would feel precluded from entertaining a bill against the heir or devisee for the administration of the real estate of such debtor as assets under the 5 Geo. II. has not, so far as I am aware, ever been expressly brought in question.

But however that may be, I cannot accede to the position that the death of the debtor affects the construction of the statute 5 Geo. II., or makes any difference as to the liability of or charge upon the lands of a debtor in his lifetime or after his death. No such distinction can be pointed out in the act itself, nor do I perceive that it is an inevitable result from the decisions already adverted to upon it. I am not disposed to carry the anomalies arising from those constructions further than they have irretrievably extended. No one has ever pretended that the words "that the houses, lands," &c., "belonging to any person indebted shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such

person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process," &c., prevents the debtor from selling his real estate to a *bonâ fide* purchaser for value, at least until judgment is entered up against him, or even until the writ of execution against his lands is placed in the hands of the proper officer to execute it. I do not feel bound by authority, nor yet compelled by any argument, to hold that the death of the debtor makes any difference or creates a different charge upon his lands. I think the language of Sir John Romilly strictly applicable, and that the statute creates only a general charge, which becomes particular in the lifetime of the debtor, either on judgment being entered against him, or, according to the case referred to, when the *fi. fa.* is delivered to the sheriff, and after his death in like manner upon judgment against his personal representatives (*Gardiner v. Gardiner*), or the delivery of a *fi. fa.* founded upon such a judgment.

In my opinion this rule should be discharged.

HAGARTY. J.—The position taken by plaintiff is strictly this:—Where the ancestor dies indebted on simple contract, and the heir, before any judgment obtained against any personal representative, aliens the estate, the creditor subsequently recovering judgment in the usual way can issue a *fi. fa.* lands, and sell the estate, without reference to any right acquired by the heir's alienees.

This is a very grave question, involving as it does the inevitable consequence that title can never be made by an heir or devisee as against any creditor of his ancestor, whether such creditor had or had not proceeded to perfect his claim by judgment, or even instituted any proceeding whatever to notify its existence to the world; and this too, even if the heir were in good faith selling a portion of the realty to pay off debts, as a purchaser would necessarily be at the peril of seeing to the application of the purchase money.



If this be the law, no lawyer could safely advise a client to purchase from an heir. Debts by note or account unheard of for years might start up, and form in fact a direct and specific lien on the estate so sold. Practically the result must be that the ancestor's lands could only be safely alienated under sale by legal process through the sheriff.

Executors and administrators can always in good faith sell the personal chattels, and pass a complete title thereto, subject of course to a full accounting for the value thereof. "It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of the testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, unto the hands of the alienee. The principle is, that an executor or administrator in many cases *must* sell, in order to perform his duty in paying debts, &c., and no one would deal with an executor or administrator if liable afterwards to be called to account."—Williams on Exrs. 5th ed., vol. ii., p. 838-9.

Lord *Mansfield* says, in *Whale v. Booth* (4 T. R. 625, note), "The general rule, both of law and equity, is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous if it were otherwise. \* \* It is also clear, that if at the time of alienation the purchaser knows they are assets, this is no evidence of fraud, for all the debts may have been already satisfied; or if he knows they are not all satisfied, must he look to the application of the money? No one would buy on such terms."

The plaintiff's counsel urges, that since 5 Geo. II., ch. 7, and the decisions of our courts thereon, lands must be regarded as chattels for satisfaction of debts, and liable to the like remedies therefor. If we concede this to him, and even carry it a step beyond the doctrine established in *Gardiner v. Gardiner*, and hold the lands to be assets in the widest sense of the term in the hands of the executor or administrator, out of which (that is, by sale of which,) the

latter can satisfy the debt, we would still have to place the lands in a far worse position than pure personalty; as the latter could be certainly sold to raise money to pay debts, and the purchasers hold them by an undoubted title, while the real estate could in practice never be safely realized, subject, as it is urged, to a specific lien to the extent of all unpaid debts.

It is too late to question the doctrine laid down in *Gardiner v. Gardiner*, after its universal adoption for thirty years. But we are not bound to go beyond its boundaries, and add another heavy burden to be borne by heirs and devisees, nor do I feel pressed by any difficulty suggested at the bar as to the manner of reaching the real estate, or compelling an accounting from the heir.

The plaintiff relies chiefly on some expressions used by the judges in *Levisconte v. Dorland* (17 U. C. R. 437.) I do not consider that the point now before us was presented in that case. It was there only necessary to decide against an attempt by an administrator to answer the plaintiff's replication of lands and claiming judgment against them, by setting up a mortgage on the land prior to the testator's death to its full value, and that the heir at law conveyed it to the administrator (the defendant), who to save costs released the equity of redemption. I concur in the decision against this rejoinder, and think the plaintiff should have had judgment, leaving him to all remedies thereunder.

From an early period our courts have decided that lands are not bound until delivery of execution process against them to the sheriff. I speak not now of the effect of the statutes recently repealed as to registering judgments.

The statute 5 Geo. II., ch. 7, makes no especial provision for suits against personal representatives, heirs or devisees, beyond what we can gather from the words, "lands," &c., "belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may *be assets* for the satisfaction thereof, in like manner as real estates

are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity," &c., "for seizing, extending, selling or disposing of any such houses," &c., "towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts.

If the statute have, as it were, converted lands into mere personalty for the payment of debts, giving them all the incidents of chattels, then an executor or administrator can deal with them as chattels, and turn them thus into money, and the *bonâ fide* purchaser acquires indefeasible title thereto. Our courts deny this application of the statute. It remains to be considered if a power of sale remains with the heir or devisee.

The fee cannot, I think, remain in abeyance, but on the death of the ancestor vests at once in the heir-at-law. The latter, I may assume, enters into possession. There is no will speaking of debts or creating any charge on the lands. The heir proposes to sell. A purchaser makes the usual searches in the county registry, finds the title clear, examines the sheriff's office, finds no execution process, causes search to be made for judgments, finds nothing; and then in good faith, knowing of no debts, purchases for value from the heir.

We are now told that if two or three years afterwards a promissory note endorsed by the ancestor be discovered, or any claims be advanced for wages, &c., &c., and a suit be commenced, and judgment ultimately recovered against an executor or administrator, that this land, so sold and in the hands of an innocent purchaser, has been always specifically liable for this debt, and can be sold on execution process on the judgment.

I hope that this will not be found to be the law of the land; and in the absence of any decision on the express point, I must at once express my dissent from any such position.



It is suggested that if the law be not so, then a fraudulent heir may at once by a sale defeat the creditors of his ancestor.

A fraudulent executor or administrator may possibly effect the same injustice ; and in the case of executors no security would be forthcoming to redress the wrong. I presume a court of equity has ample powers to interfere when required for the administration of an estate, and if there be any legal difficulty in proceeding at law against an heir, the equity jurisdiction can hardly fail to compel an account.

The difficulty that presses on me is this : Had our courts, when deciding that lands could be sold on a judgment against executors or administrators, advanced a step further, and determined that, as the statute in their judgment made them assets, subject to the like remedies and process as personal estates, they could be sold as personalty by the executors, then the remedy would be complete in practice. I think, if I could overcome the first difficulty, which is disposed of by *Gardiner v. Gardiner*, and hold that the heir's estate could be properly divested by process in a suit to which he was not a party, I would have felt myself easily drawn to the conclusion that as mere personalty the executor could sell. In *Thomson v. Grant*, (1 Russ. 540,) Sir *Thomas Plumer* says : "The executor's right of retainer over personal property is clear ; and by the act of Geo. II., plantations in Jamaica are converted, with respect to the payment of debts, into personal assets, and as such are possessed by the executor. The property is personal assets, and in all respects to be administered as such." But see as to this, *Bullen v. A'Beckett*, already cited. Such a state of the law would not help the present plaintiff, as if the executors could sell they could make a perfect title.

I concur in the result of the Chief Justice's judgment. The case cited before Sir *J. Romilly* is much in point. I refer also to *Pim v. Insall*, (1 McN. & G. 449, 458), *Re Hamer's Devisees*, (2 DeG. McN. & G. 366.)

The statute on which these decisions rest is of course much more explicit in its directions than the 5 Geo. II., ch. 7. But I do not at present see any practical difficulty in our court of equity administering the estate, and fully effectuating the legal rights of the creditors against the lands, just as the English courts act under the 3 & 4 Wm. IV.

MORRISON, J., concurred.

Rule discharged.

### TUCKER AND WIFE V. PHILLIPS ET AL.

*Will—Construction—Description of land—"North-west portion"—Right of husband and wife to bring trespass for injury to her land.*

W. devised to his daughter T. six acres off the "north-west portion of lot twenty, in the third concession of Haldimand," to be chosen by his executors, and "to extend twenty rods in width joining the northern line of said lot twenty, and extending as far south as will comprise six acres aforesaid." One B. owned a strip at the north-west corner of the lot, extending twenty rods in width to the east, the whole lot being eighty rods wide; and this strip had for forty years been enclosed and occupied. The executors chose the six acres for T. adjoining this and extending twenty rods east. Afterwards, on a survey made under Consol. Stat. U. C. ch. 93, sec. 11, the north-west angle of lot twenty was placed four rods further west; and defendants, who owned the remainder of lot twenty, then contended that T. must lose that width off the east side of her strip, as the devise restricted her to the "north-west portion" of the lot, and she could not therefore come beyond the centre into the north-east part, although she could not otherwise get more than sixteen rods in width, B. having acquired a title by possession, so that his eastern fence could not be moved.

*Held*, however, that the intention of the testator was to give six acres, twenty rods in width along the northern boundary of the lot, without reference to the strict meaning of the words "north-west portion:" that the executors had therefore chosen the land in accordance with the will; and that defendants, having trespassed thereon, were liable.

T. having the title to the land as above mentioned, she and her husband brought trespass, and defendants pleaded that the land was not the plaintiffs'. It was objected that there was no joint property to sustain the action; but *Held*, that the objection was not available as ground of non-suit. *Quære*, whether it could have been taken advantage of on demurrer or in arrest of judgment.

TRESPASS *quare clausum fregit*, upon part of the north-west half of lot number twenty, in the third concession of Haldimand, bounded on the north by the allowance for road in rear of said concession, and on the west by land occupied by Edward Belson and Elial Winter.

*Pleas*—1. Not guilty. 2. That the said land is not the plaintiffs', as alleged.

Upon the trial, at Cobourg, before *Adam Wilson, J.*, it appeared that the plaintiff Jane was the daughter and devisee of Patrick Winter, deceased: that by his will, dated 22nd of April, 1861, he devised to her six acres of lot number twenty, in the declaration mentioned, in the following words: "I will and bequeath unto my daughter Jane six acres of land off the north-west portion of lot number twenty, in the third concession of the township of Haldimand, to have and to hold unto my said daughter Jane, her heirs and assigns for ever. The said portion of land shall be chosen by my executors, and shall extend twenty rods in width, joining the northern line of said lot number twenty, and extending as far south as will comprise six acres aforesaid. \* \* \* I further will and direct that my daughter Jane shall come into possession of her portion of land without delay, and without expense of any kind whatsoever." And he bequeathed to his son George the then remaining portion of the lot, being one hundred and eighty-two acres.

The testator died in May, 1861.

One Belson owned two acres on the north-west corner of the lot, running twenty rods along the northern boundary of the lot, and bounded on the west by the allowance for road, and was living on these two acres at the time of the testator making his will and at his death, and had it fenced in.

The executors of the will were called, and they testified, in effect, that although they never met together on the land to select the six acres, they yet met one another, and talked about it; and it was agreed between them that the six acres to be selected under the will were to be six acres east of Belson's two acres, running east from his line fence twenty rods along the northern boundary of the lot, and running south sufficiently far to include six acres; and that the plaintiffs accordingly took possession of the six acres in June or July, 1861, as the property left Jane by the will.

One Richardson was called, who knew the lot since 1818. He testified that one Mercer in 1825 was in possession of twelve acres, which included Belson's two acres and the ten



acres south of Belson's, and that the (western) fence commenced twenty rods from the north-west corner of the lot and ran south: that the twelve acres was all cleared and cultivated and fenced all round: that after Mercer one Hicks was in possession of the twelve acres in 1826 and 1827; and it appeared by a deed put in that the testator conveyed these twelve acres to Hicks in August, 1825, and in it the northern boundary of the twelve acres was described as twenty rods, more or less, from a point on the allowance for road in the rear of the concession to the north-west angle of the lot. Richardson further testified, that after Hicks Harnden had possession, and after Harnden Elial Winter, who still held the ten acres; and that during all the time the land was all fenced.

Elial Winter, who occupied the ten acres, was called. He testified to making a deed of the two acres to one Carty, with the consent of Harnden, from whom Carty purchased nineteen years previous. He also testified that the line (the western boundary of the lot), as ran by Peterson, was different from what Winters and his father, the testator, thought to be the line.

It was admitted that the rest of the lot (one hundred and eighty-two acres) was devised to George Winters by the testator, and that he, George, demised the premises to one Atcheson for seven years, ending in March, 1871, and that since the lease he conveyed in fee to Phillips, one of the defendants.

The alleged trespass complained of, the removal of the plaintiffs' fence, &c., for two or three rods west of their east line, was proved.

Upon the close of the plaintiffs' case, it was objected that under the second plea the verdict should be for the defendants, because the property was not the plaintiffs',—*i. e.*, husband and wife: that if the plaintiffs were relying on possession only it was not the property of the wife, and if on the will, then it was not their property. No amendment was asked for by the plaintiffs; and the learned judge held that as husband and wife are seised in right of the wife, it may also be alleged they are possessed, although it is not

added, in right of the wife; and upon this objection he reserved leave to defendants to move.

On the part of the defendants, it was shewn that on the application of a number of freeholders, the township council petitioned the Governor, under the provisions of chap. 93, sec. 11, Consol. Stat. U. C., for a survey to be made, and a survey was made accordingly by one Peterson, in 1863, and monuments, under the authority of the Commissioner of Crown Lands, were placed, shewing the limits of lot number 20, the lot in question: that by that survey the north-west angle of lot 20 was placed four rods further west than it was formerly supposed to be. And it was contended by the defendants, that as the devise to the plaintiff Jane was six acres of the north-west portion of the lot, twenty rods in width, and as Belson had also twenty rods, both together made the whole of the north-west part of the lot; and that as the forty rods must be measured by Peterson's survey, the plaintiffs' twenty rods would end four rods further to the west than the place where the plaintiffs had their fence; and that the plaintiffs could not go beyond the centre of the northern line of the lot, because if they did they would not be taking their twenty rods off the north-west part, but would be encroaching four rods on the north-east part; and it was contended, in that case, that the defendant committed no act of trespass, but what they did was within that portion of the lot which lay to the east of the plaintiffs' six acres, and that although it would reduce the plaintiffs' northerly limit to sixteen rods, that was nothing to the defendants.

The plaintiffs, on the other hand, contended that whether Peterson's survey was binding or not was a matter of no consequence, as the testator intended to give his daughter twenty rods along the concession and off the north-west portion of the lot, and that although the twenty rods might extend beyond the centre of the northern line, the selection made by the executors was within the meaning of the will and the intention of the testator: that the testator knew of Belson's claim and title, and he did not intend to devise any portion of the land in Belson's possession: that the plaintiffs could not claim those other four rods from Belson,

because he was in possession of what he had at the time of the testator's death, and it had been held continuously for forty years by Belson and others through whom he claimed title, all which was known to the testator.

The learned Judge ruled that the plaintiffs were entitled to the twenty rods claimed by them along the north-west limit of the lot, because it was the most north-westerly part the testator had left, and the portion of that part chosen by the executors; and a verdict was thereupon rendered in their favor.

In Easter Term, *J. H. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict and to enter a nonsuit, pursuant to leave, or for a new trial, on the grounds—1st. That there was no joint property in the plaintiffs, to entitle them to maintain the action as laid jointly. 2nd. That under the facts in evidence, the *locus in quo* was not the property of the plaintiffs.

In this term *C. S. Patterson* shewed cause, citing *Bullock v. Burdett*, Dyer 281; *Roper on Husband and Wife*, 213, 215; *Abbott v. Blofield*, Cro. Jac. 644; *Peck v. Halsey*, 2 P. Wms. 387.

*Armour* supported the rule, and cited Wms. on Exrs. 251, 256; *Keates v. Burton*, 14 Ves. 434; *Chy. Plg. I. 84*.

MORRISON, J.—I am of opinion that the plaintiffs are entitled to our judgment on the second ground taken in the rule *nisi*.

The intention of the testator was to give to his daughter six acres, twenty rods wide, on the northern boundary of the lot, and running south from that boundary that width, so as to include six acres, and that the persons named by him as executors were to select where the twenty rods were to start from. The testator could have easily determined the point himself if he desired the twenty rods to commence from the fence between his land and Belson's, and which had been the boundary between them for over thirty years, or to run from a point distant twenty rods from the north-west corner of the lot, wherever it might be; or, as contended for by the defendants, from the centre of the northern boundary west; but it is quite clear that he did



not intend to limit the six acres to any particular portion, except what would come within the fair and reasonable construction and meaning of the expression "North-west portion of the lot." If the testator used these words in their strict critical sense (although I think the expression would be fairly open to a wide construction, in order to give effect to a devise in a will,) and as it appears by the plan of Peterson's survey put in, and the description in the deeds, that the lot did not run due north and south, but in a course sixteen degrees west of north, it necessarily follows that a line dividing the north end of the lot, and which would embrace the north-western portion of the lot, would intersect the northern boundary of the lot much further east than the eastern limit of the six acres chosen by the executors, and that consequently the executors had chosen six acres of the portion indicated by the testator.

If the defendants' contention is right, the executors had no choice but to select as the eastern limit of the land devised to the plaintiff Jane, a point which would be the centre of the northern boundary line according to Peterson's survey, and which, taking Belson's fence as the limit between the properties, would give only a width of sixteen rods, which could not have been the intention of the testator. The executors were not bound to make Belson's fence the western limit of the twenty rods, but they did select that point, and if by doing so it should turn out that they have left four rods wide of the testator's land between Belson's land and the plaintiffs', they had a right to do so under the will; and that fact cannot affect the right of the plaintiffs to the six acres chosen, the intervening four rods belonging to the devisee of the remaining 182 acres, of which the four rods would form a part; and I note that the conveyance of land to the defendant Phillips from the devisee George Winters, carefully avoids setting out the boundary of the 184 acres, but it conveys the whole 200 acres, excepting thereout Belson's two acres, and the plaintiffs' six acres, &c.

I am therefore of opinion, that the executors selected the six acres, the *locus in quo*, in accordance with the direction in the will, and as the plaintiffs went into possession in pursuance of that selection, and the defendants trespassed thereon, the plaintiffs are entitled to hold their verdict.

As to the objection taken at the trial and in the rule *nisi*, that there was no joint property in the plaintiffs to entitle them to maintain a joint action as laid, there are numerous cases in the books on the subject of husband and wife joining in an action of this nature, but the decisions are very unsatisfactory and inconclusive. The weight of authority, however, goes to shew that the objection taken here is not available as one for a nonsuit; although on demurrer or in arrest of judgment (if not cured by verdict), it might possibly be good. We refer to *Bidgood v. Way* (2 W. Bl. 1236, in Error), which seems to be a leading case; *Cahill v. McDowall* (12 Ir. C. L. Rep. 481); *Broom on Parties to Actions*, 231; *Johnson v. Lucas* (1 E. & B. 660). No authority was cited to us, nor have we found, after much investigation, any case in which the court gave effect to such an objection upon a motion for nonsuit; and in the absence of direct authority, I think we ought not to disturb the verdict.

We find evidence establishing title in the wife. The land is the land of the husband and wife during their joint lives; and on a mere denial that the land was their land, we cannot hold that the evidence does not prove their title. As a question of pleading, it would seem that when the wife is joined as plaintiff with the husband in an action of this kind, the nature of her interest should appear on the record.

An objection in the argument was taken by Mr. *Armour*, that the executors not having proved the will they could not act. I see nothing in the objection. The executor derives his power from the will, not from the probate; and before probate an executor can do all things which to his office as executor pertains, except the bringing of actions. But in the present case the power delegated to the executors and exercised was not as executors, but as individuals named by the testator.

HAGARTY, J., concurred.

The CHIEF JUSTICE, having been absent during the argument, took no part in the judgment.

Rule discharged.

## SHORT V. PARMER ET AL.

*Fence viewers—Effect of their award—C. S. U. C., ch. 54, sec. 360.*

Defendants having impounded the plaintiff's horses for getting into his field, the matter was referred to the fence viewers of the township, who awarded that defendants' fence was lawful, and appraised the damage. The plaintiff replevied, and desired to prove that the defendants had put up the fence higher after the horses got over and before the award.

*Held*, (affirming the judgment of the County Court) that under Consol. Stat. U. C., ch. 54, sec. 360, the award was conclusive as to the legality of the fence at the time of the alleged trespass.

APPEAL from the County Court of the County of Prince Edward.

REPLEVIN for two horses.

The defendants, William B. Parmer in his own right and Cornelius Parmer as his servant, acknowledged the taking and impounding of the horses, alleging that they were doing damage on William B. Parmer's land. The plaintiff, in his answer to this avowry, pleaded that he was the occupier of certain land in the township of Sophiasburg, adjoining that of William B. Parmer, and that the horses lawfully feeding thereon escaped into the *locus in quo* through the defect of fences which the defendants were bound to repair. On this the defendants took issue.

At the trial it appeared that the horses having been impounded by the defendants, it was agreed between the parties that the question of the lawfulness of the fence and the damages should be referred to two fence viewers, who proceeded to examine the fence and estimate the damage, Cornelius Parmer and the plaintiff being with them. They awarded in writing that the fence was a lawful one, and appraised the damage at two dollars.

The plaintiff asserted before the fence viewers that the fence had been down at the place pointed out to them previous to the horses getting in, and had been put up afterwards and before the award, but he did not offer any evidence of the fact or ask for delay. The plaintiff at the trial tendered evidence to the same effect, which the defendants' counsel objected to, contending that it was one of the questions submitted to the fence viewers, and which they had decided,



and that their decision was final. The learned judge sustained the objection; and the plaintiff declining to take a nonsuit, he charged in favor of defendants. The jury, however, found for the plaintiff.

The defendants obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, which after argument was made absolute, and the plaintiff thereupon appealed.

*C. S. Patterson*, for the appellant, cited *Bardons v. Selby*, 1 C. & M. 500; *Glover v. Dixon*, 9 Ex. 158.

*S. Richards*, Q. C., contra.

DRAPER, C. J., delivered the judgment of the Court.

We think the obvious intention of the 360th section of the municipal act, is that the fence viewers shall determine the question of the legality of the fences, as well as the damages done by the animals impounded for trespassing, and upon their determination the rights of the respective parties must so far depend. In our view, therefore, it was not open to the defendants to bring again in question the *sufficiency* of the fences, that being determined by the fence viewers; and they must be assumed to have determined the state of the fence at the time of the alleged trespass, because that is the obvious duty imposed on them by the statute.

No dispute appears to have been raised at the trial upon the avowry. The right of the defendant William Parmer to distrain, assuming the cattle to be trespassing, was not apparently denied. Then the whole question turned, according to the judge's notes of evidence, upon the proof of the allegation in the defendants' plea as to the sufficiency of the fence, which it seems not to have been denied the defendant William was bound to repair.

We think, therefore, we should uphold the decision of the Court below, and dismiss this appeal with costs.

Appeal dismissed.

## WILSON ET AL. V. VOGT.

*Partnership—Rights of Execution creditor of one partner.*

V. and J. D. being in partnership, J. D. went out, and his father D. D. took his place in the firm. About six months after this V. assigned to D. D. all the stock in trade, but possession was not changed, nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue, to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after the plaintiffs' title accrued did not appear:

*Held*, that they must succeed: that they were clearly entitled to the goods themselves, for defendant as creditor of one partner could not seize them out of the possession of the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts.

APPEAL from the County Court of the County of Wentworth.

Interpleader Issue, to try whether certain goods taken on execution by the sheriff of Wentworth, on a *fi. fa.* tested the 17th of December, 1864, were at the time of the claim made by the plaintiffs their property as against the defendant.

The *fi. fa.* was on a judgment recovered by the defendant against Caleb Hopkins VanNorman. The plaintiffs claimed as assignees under the Insolvent Act of 1864, of the estate, &c., of a firm styled "C. H. VanNorman & Co.," and whereof Caleb Hopkins VanNorman and Daniel Dewey were the partners, and as assignees of the estate of each of the partners.

It appeared that VanNorman was Daniel Dewey's son-in-law. A small portion of the goods seized were admitted to have belonged to VanNorman. The residue were in the store where the business of C. H. VanNorman & Co. was carried on, as part of their stock in trade.

The plaintiffs proved a deed, dated the 3rd of October, 1862, whereby VanNorman, in consideration of \$12,000, bargained, sold and delivered to Daniel Dewey, all the watches, clocks, jewellery, fancy goods, and other stock in trade, &c., then in the store occupied by him in the name of C. H. VanNorman & Co.

They also proved a power of attorney under seal, dated

the 3rd of October, 1862, whereby D. Dewey, after stating that he had purchased the watch and jewellery business theretofore carried on by VanNorman and John W. Dewey, under the style of C. H. VanNorman & Co., constituted C. H. VanNorman his attorney, to conduct the business.

It was proved that the books continued to be kept in the name of C. H. VanNorman & Co., not in VanNorman's name alone. The name of the firm was "C. H. VanNorman & Co." when John Dewey was partner with VanNorman. The same style was continued after he left, and after the assignment, and it remained on the sign and on the bill headings. Nothing gave the public notice that Daniel Dewey was interested. He gave his notes for the \$12,000. They were payable \$400 per month. A witness swore that about twelve were taken up while he was there.

Daniel Dewey swore, that when John Dewey went into the business he put \$6000 into the concern to advance his son. When John left he (the father) bought out the whole business. The whole amount of his purchase was \$3000, which he said was pretty much paid. Before the sale (of the 3rd of October, 1862,) the goods were partly his and partly VanNorman's. Afterwards VanNorman was not interested in the goods, but only in the profits. That when Daniel Dewey went into the business VanNorman was in difficulty, and Dewey gave his notes to be used in payment of VanNorman's debts. VanNorman managed, and had half the profits and his living. Dewey's notes were taken up out of the business.

He proved the execution of another bill of sale from VanNorman to himself, consideration \$12,000; which, in addition to the goods, &c., purported to sell and convey to Dewey all books and accounts connected with the business. He said he did not register the bill of sale, as he had confidence in VanNorman. He supposed at the time of execution that they were duplicates.

The jury, on the question being expressly submitted to them, found that Daniel Dewey became a partner with VanNorman when John Dewey went out of the concern,



which was about six months before the 3rd of October, 1862; and on this finding the learned judge directed the verdict to be entered for the plaintiffs.

There were a few goods admitted to belong to VanNorman alone, and it was afterwards agreed that as to them the defendant should have a verdict.

The defendant's counsel obtained a rule to enter a non-suit on the verdict for him on leave reserved at the trial, or for a new trial.

After argument the learned judge made the rule absolute to enter the verdict for the defendant as to the goods agreed upon, and as to the residue he discharged the rule with costs.

The defendant appealed, assigning as grounds of appeal: 1. That the claim set up at the trial, in the first instance, was by the plaintiffs as assignees of Daniel Dewey, failing in which the jury should have been told to find a verdict for the defendant.

2. Had it appeared upon the application for an issue, that the property was claimed to be the property of VanNorman and Dewey, no issue would have been ordered, as there would have been under those circumstances no adverse claim to warrant such application.

3. That the learned judge was wrong in directing, upon the facts found by the jury, that the verdict should be entered for the plaintiffs, and he should in term have made the rule absolute to enter it for the defendant.

4. That the verdict of the jury and the judgment founded thereon are contrary to law and evidence, in this, that the witnesses established that the property belonged at one time to the said VanNorman alone, and the sale and transfer to Dewey, if any such there were, was, under the provisions of the Chattel Mortgage Act, void as against the defendant.

*Burton*, Q. C., for the appellant.

*R. Martin*, contra, cited *Samuel v. Duke*, 3 M. & W. 622; *Taylor v. Jarvis*, 14 U. C. R. 142; *Wilson v. Corby*, 11 Grant, 92; *Flintoff v. Dickson*, 10 U. C. R. 431.

DRAPER, C. J., delivered the judgment of the court.

The fourth ground is the only one that is arguable, namely, that the witnesses established that the property at one time belonged to VanNorman alone, and the sale and transfer to Dewey, if any such there was, were subject to the provisions of the Chattel Mortgage Act, and therefore void, for non-compliance therewith as against the defendant, a creditor.

Answer, that before the assignment to Daniel Dewey John Dewey was in possession as joint owner with VanNorman, being his co-partner. Therefore the assertion that the goods belonged to VanNorman alone is not sustained, and the argument predicated on that assertion fails.

In our opinion the appeal should be dismissed. The goods now in question were the goods of the firm of VanNorman & Co. The plaintiffs are assignees of that firm for the benefit of all its creditors, as well as assignees of each co-partner. The creditors of the firm are entitled to be paid out of the proceeds of these goods in priority to the creditors of either partner, and we think that under these circumstances the defendant could not seize and sell out of the possession of the assignees the interest of the one partner his debtor. The only doubt could be, whether the defendant might not sell the interest of VanNorman, subject to the prior satisfaction of the claims of the creditors of the firm, and it does not appear on this appeal book whether the suit against the debtor VanNorman came to the sheriff's hands before the title of the plaintiffs as his assignees accrued. *Prima facie* the plaintiffs are right, and we see nothing advanced for the defence to displace their right. The plaintiffs appear to us to shew a clear right to the goods themselves, whatever ultimately may become their duty as to the proceeds; they can dispose of the whole, and must distribute the proceeds legally. If after the partnership debts are paid, there is a surplus divisible between Dewey and VanNorman, we are not deciding that the defendant may not have a right to priority of satisfaction out of VanNorman's share.

Appeal dismissed.

# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH,

FROM TRINITY TERM, 28 VICTORIA, TO TRINITY TERM, 29 VICTORIA.

### ACCEPTANCE.

*Proof of, in action for goods sold.]*  
—See SALE OF GOODS.

### ACCORD AND SATISFACTION.

*Pleading—Accord and satisfaction.]*—Declaration by P.'s administrator on a promissory note made by defendant payable to P. Defendant pleaded, by way of accord and satisfaction, a certain proposition made to the plaintiff and D. as curators of P.'s estate in Montreal, which was, in effect, that one R. would endorse defendant's notes for 17s. 6d. in the £. payable at certain dates, on getting a full discharge; and the defendant averred that the plaintiff and D., as such creditors, "agreed to and accepted the terms of the said proposition," and defendant made and R. endorsed his notes in accordance therewith, and delivered the same to the agent of the said curators in full satisfaction and discharge and as a composition of the causes of action sued for. *Held*, on demurrer, plea bad, for not averring either that the notes or the agreement were accepted in

satisfaction and discharge.—*Macfarlane, administrator of Thomas C. Panton, v. Ryan, 474.*

### ACTION.

*For advances on goods received for sale—When it may be brought.]*  
See CONTRACT, 4.

*Warehouse receipts—Error in quantity—Action by assignee against the giver.]*—See FRAUDULENT REPRESENTATION.

*On bond to pay debt due by plaintiff—When it may be brought.]*—See INDEMNITY.

*Not maintainable by sheriff against execution debtor for poundage.]*—See SHERIFF, 3.

*Trespass maintainable against owner of ox, for injury done by it.]*  
See TRESPASS.

*By wife alone, for seizing her goods.]*—See HUSBAND AND WIFE, 2.

*For injury to wife's land.]*—See HUSBAND AND WIFE, 3.

*Maintainable by lessees of land as "proprietors" against R. W.]*—See RAILWAYS AND RAILWAY COMPANIES, 6.



## ADMISSION.

*How far evidence of scienter.*]—See TRESPASS.

*By pleading.*]—See ARBITRATION AND AWARD, 2.

## ADVANCES.

*On goods received for sale—Right of action for.*]—See CONTRACT, 4.

## ADVERTISEMENT.

*Of sale of lands under execution.*]—See EXECUTIONS, 2, 3.

## AFFIDAVITS.

*How far admissible on application for discharge under Habeas Corpus.*]—See HABEAS CORPUS.

*Entitling of, on application to quash inquisition.*]—See INQUISITION.

*Attention called to Rule No. 112, requiring division into paragraphs.*]—See PARTITION, 2.

## AGREEMENT.

See CONTRACT.

## AMENDMENT.

*C. L. P. Act, sec. 222—Construction of—Usury—Variance.*]—Under the C. L. P. Act, sec. 222, all amendments necessary to determine the real question in controversy are imperative, without reference to the character of the action or defence. The only point for the court or a judge to determine is whether they are so necessary.

In an action on promissory notes, the defence set up being usury, *Held*, that variances in the amount stated as intended to be loaned and in the sum stated as the excess beyond legal interest, were material. The learned judge at the trial refused

to amend in these respects, desiring the opinion of the court. *Held*, that being an amendment necessary for the purpose of determining the real question in controversy between the parties, he was bound by the C. L. P. Act, sec. 222, to allow it. The amendment was therefore ordered, and a new trial granted.—*Bank of Montreal v. Reynolds et al.* 381.

*Of proceedings in partition.*]—See PARTITION, 1.

## APPEAL.

1. Where, in a case of collision, the judge of the county court reported that he thought he had not sufficiently directed the jury to the rule laid down in *Tuff v. Warman*, 5 C. B. N. S. 573, as to the effect of negligence on the plaintiff's part, and that he had therefore granted a new trial, this court on appeal refused to interfere. *Somers v. Livingston et al*, 64.

2. *From county court.*]—The court refused to interfere upon appeal from a county court, where a new trial had been refused in a case depending solely upon evidence, and involving a question of fraud.—*McKinstry v. Furby*, 176.

3. *Allowance of bond—Right to enter judgment after—Judge's order—Effect of.*]—A rule nisi for a new trial having been discharged, the defendant gave notice of appeal, and obtained a judge's order to stay proceedings until the appeal bond should be entered into by the plaintiff, or until there should be a rule allowing him to proceed. The appeal bond was marked "allowed" by a judge in Chambers, after which the plaintiff entered judgment on his verdict. On motion to

set aside this judgment. *Held*, that the order ceased to stay proceedings after the appeal bond had been allowed: that such allowance was a supersedeas of execution only; and that the judgment, therefore, should be allowed to stand, subject to the decision in appeal.—*Robinson v. Gordon et al.*, 285.

4. *Verdict entered on motion, without leave reserved—Practice.*—A rule *nisi* to enter a verdict for plaintiff, or for a new trial, was made absolute in the county court in the first alternative, although defendant had not assented to any leave being reserved to move. On appeal this court directed the rule absolute to be discharged, leaving it to the court below to dispose of the application for new trial, the other alternative of the rule *nisi*.—*Ball v. Sprung*, 422.

5. *Objections to Bond.*—At the trial of a cause it was agreed, as stated in the judge's notes, that the court might draw inferences of fact as a jury, or refer to an arbitrator any questions on which they might find the evidence insufficient; and a verdict was taken for the plaintiff, subject to be reduced or entered for the defendant. Judgment was given for the plaintiff, and on motion to allow an appeal bond, in a penalty of £100, it was objected that no appeal would lie, and that if it would the bond should be not merely for costs, but to secure the amount of the judgment. *Held*, that these objections must be decided by the court above, and the appeal bond was allowed as a security to the satisfaction of this court. *Semble*, however, that it was sufficient in amount, the case being one in which, under C. S. U. C. ch. 13, sec. 16, sub-sec. 4, there was no stay of execution.—*Gossage*

*v. The Canadian Land and Emigration Company*, 452.

6. *From C. C.—Form of bond—C. S. U. C., ch. 15, sec. 68; 27 Vic., ch. 14.*—The condition of the bond required on appeal from the county court must be that *the appellant* shall abide by the decision of the court appealed to, and pay, &c.; and where the condition was that *the sureties* should abide, &c., and the appellant did not join in the bond, the appeal, which had been entered for argument, was struck out of the paper. *Quære* as to the effect of Consol. Stat. U. C., ch. 15, sec. 68, as amended by 27 Vic., ch. 14.—*Pentland v. Heath*, 464.

*To Quarter Sessions—Commitment for non-payment of costs of.*—*See JUSTICES OF THE PEACE*, 2.

## APPEARANCE.

*Several defendants—Unauthorized appearance for one—Proceeding after notice of—Practice.*—In an action against three partners, upon notes signed by and for goods sold to the firm, C., an attorney, appeared on the 24th of March, for all the defendants, his only instructions being, as he swore, from one of them, to defend for time. On the 29th G., another defendant, appeared by his attorney S., who, on the 6th of April, notified the plaintiff's attorney to serve the declaration and all other papers on him, or that the proceedings would be moved against. He heard nothing more, however, until after final judgment, which was entered on the 13th of April, a verdict having been taken on the same day upon a consent signed by C. When the declaration was filed or served did not appear. *Held*, that the proceedings against G., subsequent to the ap-

pearance entered by S. for him, must be set aside, with costs.—*Clark v. Galbraith et al.*, 25.

## ARBITRATION AND AWARD.

1. *Notice to produce—Time of service—Award, proof of—Right to recover costs directed to be paid equally.*—The declaration alleged that the plaintiff and defendant each became bound to the other, conditioned, after reciting certain differences that had arisen, to abide by the award of two persons named, and such third person as they might appoint, concerning the same, costs to be in their discretion: that an award was duly made that defendant should pay the plaintiff \$440, and each pay their own costs of the submission, and that \$60, other costs, should be paid by them equally. *Breach*, non-payment of the \$440. and a moiety of the \$60. *Pleas*, denying the submission and award. The plaintiff proved the execution of the defendant's bond, and gave secondary evidence of having executed a similar bond himself, which was given to defendant, and of the appointment of the third arbitrator endorsed on it, having served a notice to produce on defendant's attorney, at 11 a.m., on the day previous, the commission day, defendant living seventeen miles off, at a place to which there was a daily mail. He also proved by one of the arbitrators the execution of the award by all three. *Held*, 1. That the execution of plaintiff's bond being put in issue, it might properly be presumed to be in possession of defendant's attorney; and if it were not, that the notice under the circumstances was sufficient. 2. That the award being signed by the three arbitrators, afforded proof, *primâ facie*, that they signed in

each other's presence, no question having been put to the witness on that point. 3. That the plaintiff having paid the \$60, was not entitled to recover half of it from the defendant. The rule *nisi* was to enter a nonsuit on the first two points, or to reduce the verdict on the third, and as each party failed on a material part of the rule, no costs were allowed.—*Sullivan v. King*, 161.

2. *Finality and certainty—Pleading.*—Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others the costs of a certain action in the C. P. between the parties, and awarded that defendant should convey certain specified land to the plaintiff in fee, and should pay him all costs of the reference and of the said action in C. P., and that they should execute mutual releases. *Breach*, non-payment of the costs of reference or of the suit. Defendant pleaded, 1. *Non est factum*. 2. That the arbitrators did not make any such award. The award mentioned no suit, but awarded the costs of reference "and also all costs that may have been incurred by any legal process through which the matter relating to this arbitration may have passed previous to this award." The plaintiff's attorney in the suit in C. P. produced the bill of costs in that suit. *Held*, that the award was sufficiently certain and final, if the existence and subject of the suit and its connection with the matters referred had been properly set out in the declaration and proved; but that, on these pleadings, the suit and the fact of its reference might be taken to be admitted; and a verdict for the plaintiff was therefore upheld. *Hibbert v. Scott*, 581.



*Arbitrations under "The Railway Act."—See RAILWAYS AND R. W. COMPANIES, 4, 5, 10.*

*Award of fence-viewers under The Municipal Act—Effect of.]—See FENCE VIEWERS.*

## ASSESSMENT.

*See MUNICIPAL CORPORATIONS, 1  
2.—TAXES.*

## ASSIGNMENT.

*Plea of set-off—Equitable replication, assignment of the claim and notice to defendant.]—Defendant having pleaded a set-off to an action upon a covenant for the payment of money, the plaintiff replied on equitable grounds, in substance, that the deed declared on, and the moneys sued for, were before this action, and before the alleged set-off had accrued, duly assigned for value by the plaintiff to D., and by D. to B.: that defendant had notice of and assented to both assignments, and that this action was brought for B.'s benefit, the plaintiff being a nominal plaintiff only: that after the said assignments and notice thereof, B. sued defendant in the plaintiff's name on the same covenant for another breach, to which defendant pleaded *non est factum*, and a verdict and judgment were recovered against him, which he paid; and it is inequitable that he should now set up the defence pleaded. *Held*, on demurrer, reversing the judgment of the county court, replication good. *Dennison v. Knox*, 119.*

*Agreement to clear land—Assignment of, not under seal—Rights of assignee.]—See CONTRACT, 3.*

*Assignment of lease—Action by lessee against assignee on his covenant to indemnify—Right to recover costs of suit and interest.]—See INDEMNITY, 2.*

*Assignment of goods by firm—Rights of execution creditor of one partner.]—See EXECUTIONS, 6.*

## ASSURANCE.

*See INSURANCE.*

## ATTACHMENT.

*For fraudulent use of mandamus.]—See MANDAMUS.*

## ATTORNEY:

*Ordered to pay costs, on granting new trial.]—See NEW TRIAL, 2, 3.*

*Delay of attorney no defence to action on replevin bond.]—See REPLEVIN.*

## AWARD.

*See ARBITRATION AND AWARD.*

## BAILEE.

*Of goods, may recover full value against wrong-doer.]—See TRESPASS.*

## BAILIFF.

*Action against division court bailiff for seizing goods—Proof and effect of decision on interpleader summons—Demand of perusal and copy of warrant.]—See DIVISION COURT,*

## BAWDY-HOUSE.

*Conviction for keeping—Form of, &c.]—See HABEAS CORPUS.*

BILLS OF EXCHANGE AND  
PROMISSORY NOTES.

*Waiver of notice of dishonor—Evidence of.*]—The plaintiffs sued the drawer of a bill of exchange for \$1,000, upon it and two notes, for \$1,000 and \$500 respectively. No notice of dishonor of the bill had been given, but the plaintiffs' agent swore that after its maturity, in conversations with him respecting the whole liability, defendant appeared willing to pay if time were given, and said that if he and his brother (the acceptor) got time it would be all right. He said, however, that this bill was never particularly mentioned, and no promise made relating to it specifically. *Held*, not sufficient to warrant a verdict for the plaintiffs, and such verdict having been found, a new trial was granted without costs, unless the plaintiffs would consent to a *stet processus* on the count upon the bill. *The Bank of Montreal v. Scott*, 115.

See ACCORD AND SATISFACTION.

## BOND.

*Allowance of, on appeal from Q. B.*]—See APPEAL, 3, 5.

*Form of, on appeal from C. C.*]—See APPEAL, 6.

*Bond to pay debt due by plaintiff—When the liability accrues.*]—See INDEMNITY, 1.

See RECOGNIZANCE.—REPLEVIN, 2.

## BROKER.

*Advances on goods received for sale—Right of action for.*]—See CONTRACT, 4.

## BUILDING SOCIETIES.

*By-law imposing fines—Construction of—Common counts*]—The by-law of a building society provided, that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of one year, when the share or shares in default shall be declared forfeited to the society." It then directed that a month before the expiration of such year the secretary should send a notice to the defaulter, calling his attention to the by-law; and provided that in case of the defaulter being a borrower these fines should be trebled, and that at the end of six months' default the mortgage should be liable to foreclosure, and to be declared forfeited. *Held*, that the by-law, being penal in its character, should be construed strictly; and that the fines could be imposed on borrowers only for twelve and on non-borrowers for six months, the right to forfeit or to foreclose being then substituted. *Held*, also, that such fines could not be recovered on a common count, but that the declaration should set out the by-law, so that the court might judge of its legality. *Ottawa Union Building Society v. Scott*, 341.

## BUTCHERS.

*Licenses to.*]—See MUNICIPAL CORPORATIONS, 3.

## BY-LAWS.

See BUILDING SOCIETIES—MUNICIPAL CORPORATIONS—TEMPERANCE BY-LAWS.

## CANADA COMPANY.

*Proof of conveyance from—27 & 28 Vic. ch. 100.]—Held*, that under the 27 & 28 Vic. ch. 100, a deed from the Canada Company, dated February 17th, 1835, in the form given by the Imperial Act, 9 Geo. IV., ch. 51, and under the seal of the attorneys of the company, was proved by its mere production, and was sufficient to pass the fee. *Fell v. South*, 196.

## CARRIERS.

See RAILWAYS AND RAILWAY COMPANIES, 2, 7, 8, 9, 11.

## CASE.

*Action on the, not maintainable against magistrate acting out of his county.]—See MALICIOUS ARREST, 2.*

## CERTIORARI.

See HABEAS CORPUS, 1.

## CHAMPERTY.

*Agreement—Illegality—Champerty.]—The plaintiffs having recovered judgment against B. & P., agreed with the defendant that if such judgment, or any portion of it, should be realized from property to be pointed out by him, he, defendant, should have one-third of the amount so realized; "all costs that may be incurred in endeavouring to make the money to be payable by him if successful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided." Goods pointed out by defendant having been seized under the plaintiffs' execution were claimed, and on an interpleader issue were found to*

*be the claimant's. The plaintiffs thereupon sued defendant on the agreement, for their costs of defence in the interpleader, &c., which they had been compelled to pay. Held*, that if such agreement extended to these costs, it was illegal as being contrary to public policy, if not within the definition of champerty; and if it did not so extend the plaintiffs could not recover. A nonsuit was therefore ordered. *Kerr and Brown v. Brunton*, 390.

## CHARACTER.

*Evidence of, when admissible in slander.]—See LIBEL AND SLANDER.*

## COMMITMENT.

See HABEAS CORPUS, 1.

## COMMON COUNTS.

*Fines imposed under a By-law cannot be recovered under.]—See BUILDING SOCIETIES.*

*Never indebted, held a good plea to count under the Railway Act, for costs of arbitration.]—See RAILWAYS AND RAILWAY COMPANIES, 5.*

*Goods sold to be paid for as delivered—Action on, for part.]—See SALE OF GOODS.*

## COMPUTATION OF TIME.

See NOTICE TO EXAMINE—TEMPERANCE BY-LAWS, 2.

## CONDITIONS.

*Right of carriers to impose.]—See RAILWAYS AND RAILWAY COMPANIES, 11.*



## CONTRACT.

1. *Agreement to edit a magazine—*

*Construction — Pleading — Written agreement allowing absence—Collateral stipulation as to time of return*

*—Pleading.]*—The first count alleged that the defendant agreed under seal with the plaintiff to edit a magazine owned by her, on certain terms specified, but that he refused to continue as such editor, whereby she was forced to discontinue the publication. Defendant pleaded that before any breach of his agreement the plaintiff, finding the magazine did not pay, ceased to publish it, whereby he was prevented from acting as editor, although he was ready to do so. *Held*, clearly a good defence.

In another count the plaintiff alleged that, although defendant was allowed by mutual agreement to absent himself until the 27th of January, 1864, yet he did not after that day return to his duties as editor. To this defendant pleaded that before any breach, by a memorandum under seal between him and the plaintiff, it was agreed that defendant should go to Europe to try and sell the magazine, and that during his absence the editorial department should be provided for by the plaintiff: that it was no where stipulated in such agreement that the defendant should return by the 27th of January, or any other day: that he was necessarily absent on such journey until March following, and on his return was ready to resume his duties, but before his services were required the plaintiff discontinued the publication. *Held*, on demurrer, a bad plea, for it was not averred that the agreement pleaded contained the whole contract as to the defendant's absence, and there might have been

a collateral independent agreement that he should return by a specified day. *Elmore v. Hind*, 136.

2. *Written agreement—Parol evidence—Custom in marking timber.]*

*—By an agreement under seal between the plaintiff and B., B., in consideration of seven cents per foot, agreed to deliver to the plaintiff at Goderich harbor 14,000 cubic feet of good elm timber, to be of specified dimensions, and nothing but good sound rock elm; the plaintiff to draw it from the bush, and leave it on the bank of the river Maitland, and to pay at certain periods named. In trover for such timber, which the defendant claimed under a purchase from B., Held*, that the agreement clearly did not prevent the plaintiff from shewing that the timber to be delivered belonged to him, and not to B.

The fact that the timber was marked with B.'s mark was relied upon by the defendant to shew that it was not the plaintiff's. *Held*, that the plaintiff might shew, in answer, that it was not uncommon for persons in charge of but not owning timber thus to mark it. *Little v. Foley*, 177.

3. *Agreement to clear land—Assignment of, not under seal—C. S. U. C., ch. 90, sec. 4—Right of assignee to the crop.]*

*—D., in November, 1862, took land from defendant's agent on a written agreement to clear so much a year, getting certain crops, and all the timber, excepting pine of a specified size. In July, 1863, D. wrote to the plaintiff that if he would complete the clearing under this arrangement, and deliver to D. \$40 worth of cordwood, he should have all the benefit arising from it. Under this the plaintiff claimed a crop of wheat*

sown in the fall of 1863, and seized by the sheriff in July, 1864, under an execution against D. On an interpleader issue the jury found for the plaintiff, negating any fraud as between him and D. *Held*, that the plaintiff could have no title to the land, for the agreement with D. and assignment to the plaintiff, not being by deed, were both void, under Consol. Stat. U. C. ch. 90, sec. 4; but that having been let into possession by D., and having cultivated the land for his own benefit, and at his own expense, it could not be held that the wheat, which was an independent chattel, not within the statute, was defendant's property; and that the verdict therefore must stand. *Hogan v. Berry*, 346.

4. *Advances on goods received for sale—Right of action for.*—Defendant living at Chatham, consigned to the plaintiff, at Montreal, certain tobacco for sale, and, without authority, drew upon him at the same time for \$250, which the plaintiff accepted and paid. The price which defendant asked could not be obtained in Montreal, and the plaintiff therefore shipped the tobacco to England, where it was sold. The net proceeds, after deducting freight and charges, were only £14 sterling, and he sued defendant upon the common counts for the difference, \$278, the expenses of shipping being also deducted. Defendant pleaded never indebted, payment, and set-off. When the draft fell due defendant had written to the plaintiff, offering to raise funds to retire it by drawing upon him again. The account sales received by the plaintiff from England had been sent to the defendant, who said, on receiving them, that he did not think he ought to bear the whole loss, but offered \$150.

The jury gave a verdict for \$200. *Held*, there being no evidence of any special contract, that the plaintiff was entitled to recover his advances without waiting for the sale of the tobacco, and that if he had done wrong in his dealings with it, such defence should have been pleaded. The verdict was therefore upheld.—*Stewart v. Lowe*, 434.

See CHAMPERTY.—RAILWAYS AND RAILWAY COMPANIES, 6, 8, 9.

### CONVICTION.

See HABEAS CORPUS.

### CORONER.

See INQUISITION.

### CORPORATIONS.

See MUNICIPAL CORPORATIONS.—RAILWAYS AND RAILWAY COMPANIES.—ROAD COMPANIES.

### COSTS.

*Motion to revise—Counsel fees, &c.*—On motion by plaintiffs to revise taxation, *Held*,

1. That under rule of court of H. T. 22 Vic., 18 U. C. R. 58, now in force, no single judge is authorized to grant an order for a larger counsel fee than the tariff specifies, nor can the Master allow more as between party and party.

2. As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vic., and the master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries.

3. A misnomer of a witness, *David* instead of *Daniel*, would be immaterial.

4. All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay.

5. No term fee is allowable, unless there has been some proceeding during the term.

6. Attendance to hear judgment should only be taxed once—that is, attendance when judgment is delivered.

7. Defendants could not tax the costs of enlarging plaintiffs' rule for their own convenience.

8. That service of subpoenas made by one of the defendants could not be allowed, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.

9. That if a brief for second counsel was actually prepared, his accidental absence at the trial should make no difference.

10. Plaintiff having attended under defendants' notice, without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendants' costs.

The question of costs of this application was reserved until after the master's report. *Ham et ux. v. Lasher, et al*, 357.

*No costs allowed when each party failed on a material part of a rule.*] See ARBITRATION AND AWARD, 1.

*Covenant to indemnify—Right to recover costs and interest.*]—See INDEMNITY, 2.

*Attorney ordered to pay when new trial required owing to his absence.*]—See NEW TRIAL, 2, 3.

*Of arbitration under "The Railway Act," must be taxed by the C. C. judge.*]—See RAILWAYS AND RAILWAY COMPANIES, 4.

*Improper award of, no objection if separable from the rest of the award.*]—See RAILWAYS AND RAILWAY COMPANIES, 10.

See CHAMPERTY—EJECTMENT, 6.—JUSTICES OF THE PEACE, 2, 3.—PARTITION.—SHERIFF.

## COUNTY COURT.

See APPEAL, 1, 2, 4, 6,—SHERIFF, 1.

## COVENANT.

See INDEMNITY, 2.

## CRIMINAL LAW.

See ELECTIONS.—HABEAS CORPUS.—INQUISITION.—RECOGNIZANCE.—TORONTO STREET RAILWAY COMPANY.

## CROPS.

*Agreement to clear land—Assignment of not under seal—Right of assignee to the crops.*]—See CONTRACT, 3.

## CUSTOM.

*In marking timber.*]—See CONTRACT, 2.

## DAMAGES.

*New Trial granted for smallness of damages.*]—See NEW TRIAL, 1.

*For excessive damages.*]—See RAILWAYS AND RAILWAY COMPANIES, 2.

"Continuation of Damage," un-



*der the Railway Act.*—See RAILWAYS AND RAILWAY COMPANIES, 6.

*Measure of, in action on replevin bond.*—See REPLEVIN, 2.

### DECEIT.

See FRAUDULENT REPRESENTATION.

### DEED.

*Construction of—Held to create tenancy in common.*—See EJECTMENT, 4.

### DEFAMATION.

See LIBEL AND SLANDER.

### DELAY.

*In prosecuting replevin suit.*—See REPLEVIN.

### DEMAND.

*Of perusal and copy of warrant.*—See DIVISION COURT.

*Of possession.*—See HUSBAND AND WIFE, 1.

*Of Taxes by Collector.*—See TAXES, 2.

### DESCRIPTION OF LAND.

*Commencement on a stream—Effect of.*—Where land is described as commencing at the intersection of a road allowance by a stream, and the boundary lines at once diverge from the stream on either course, *Quære*, where is the point of commencement? in the middle of the stream or on the bank? and what are the owner's rights as regards the water?

This question was discussed but not decided, as the plaintiff failed to shew that any part of his land came to the stream. *Hamilton v. Gould*, 58.

*In sheriff's deed on sale for taxes.*—See TAXES, 1.

*In Will—"North-west portion" of lot.*—See WILL, 3.

### DESISTMENT.

*Notice of, from arbitration under the Railway Act.*—See RAILWAYS AND RAILWAY COMPANIES, 5.

### DEVISE.

See WILL.

### DISORDERLY HOUSE.

*Form of conviction for keeping, &c.*—See HABEAS CORPUS, 1.

### DISTRESS.

*Right of J. P. to commit without first issuing a warrant of distress.*—See JUSTICES OF THE PEACE, 3.

See TAXES, 1.

### DIVISION COURT.

*Trespass—Interpleader in Division Court—Informal adjudication—Evidence of—Evidence of Trespass—Notice of action—Demand of warrant, under sec. 195, D. C. Act.*—In an action of trespass against a division court bailiff and one B., for entering plaintiff's close and taking goods, defendants pleaded that one H. having recovered a judgment in a division court against O., the plaintiff's mother, and the goods in question having been seized under an execution issued thereon, the plaintiff claimed them, whereupon the bailiff obtained an interpleader summons, on which the judge, after hearing the parties, adjudged that the goods were the property of the

said execution creditor, and liable to said execution. The interpleader summons was produced, with a minute endorsed by the judge, adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff called witnesses, who swore that the judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days. *Held*, that the minute of adjudication and order were conclusive to shew that the summons was not enlarged, and that the jury should have been so directed. *Held*, also, that although the minute was informal, in adjudging that the goods were the property of the execution creditor, instead of saying that they were the claimant's, or not the execution debtor's, yet it was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff. Defendant B. having declared that he owned the debt, and that the execution was issued at his instance, and having appeared for the execution creditor on the interpleader summons. *Held*, sufficient evidence to go to the jury of his being a joint trespasser. *Held*, also, that no demand of perusal and copy of warrant from the bailiff was necessary, following *Sayers v. Findlay*, 12 U.C.R. 155. *Oliphant v. Leslie and Broddy*, 398.

## DOMESTIC ANIMALS.

*Injury by—Trespass maintainable against owner.*]—See **TRESPASS**.

## DOWER.

1. *Statute of Limitations—Exchange.*]—Dower.—First plea, that

the seisin of the husband was a seisin in law, and that he was seised upwards of forty years before this suit, and for upwards of that time before this suit the tenant, and those under whom he claimed, were in actual possession of the lands, claiming title adversely to the husband. *Held*, no defence, for though a dowress in one sense claims through her husband, yet the right claimed is one that first accrues, not to him, but to her on his death. Second plea, that during the marriage, the husband agreed with one D. to exchange the lands in question with other lands, and in pursuance thereof, they by deeds "conveyed" the lands to each other, D's wife barring her dower: that the demandant afterwards elected to take her dower in the other land, and by deed released the same to one C. *Held*, plea bad, as not shewing strictly an "exchange" of the lands, for the word *convey* has not the same effect, and *semble*, no other word can be substituted. *Leach v. Dennis*, 129.

2. *Pleading—Evidence.*]—Dower. Plea, that the demandant never was accoupled to the said J. L. (the husband) during the time the said J. L. was seised of the said land. *Held*, that the plea admitted the seisin, and denied the coverture only. *Loose v. Murray*, 586.

*Proof of release—Secondary evidence—Admissibility of evidence relating to previous ineffectual release—Best evidence.*]—See **EVIDENCE**, 1.

## EDITOR.

*Agreement of with publisher—Construction of.*]—See **CONTRACT**, 1.

## EJECTMENT.

1. *Notice of title.*—A defendant appearing in ejectment cannot be compelled to file a notice of his title; but if he does not he is precluded from setting up title in himself, and the plaintiff will recover on proving his own title. *Fairman v. White*, 123.

2. *Notice of title.*—The plaintiff, in ejectment, describing herself as executrix of R. S., claimed title by virtue of "a mortgage made by the defendant." *Held*, that she was not restricted to proof of a mortgage made to herself, but might shew one to testator, and her own right as devisee; and that omitting to name the mortgagee was at most only want of "reasonable certainty," for which defendant might have applied under sec. 13, of the Ejectment Act, C. S. U. C., ch. 27. The addition of "executrix of," &c., to the plaintiff's name, *Held*, mere matter of description. *Skeahon, Executrix of Richard Skeahon, v. Whelan*, 174.

3. *Proof of title.*—In ejectment the plaintiff proved a mortgage to him in fee from one B., and called a witness who swore that he purchased from one P. the east half of the lot, of which this land was part, excepting nine acres: that P. had been in possession of the east half since 1850, and gave B. possession of the land sued for before witness purchased the remainder from P., and that defendant told him he had bought from B. When defendant entered, or under what right, did not appear. *Held*, sufficient *prima facie* evidence of title in the plaintiff as against defendant. *Covert v. Robinson*, 282.

4. *Tenancy in common*—C. S. U. C., ch. 37, secs. 29, 30—*Neglect to*

*give notice under—Voluntary conveyance—Registration.*—In ejectment for part of the east half of a lot, it appeared that L., the patentee, in 1855 executed an agreement under seal, whereby he gave to his son James his right, title and interest of one-half of the east half, with certain portions of the house, stipulating that he was to till the farm as usual, and give his father one-half of the produce, if demanded. In 1863 L. conveyed to two other sons the east half, the consideration expressed in the deed being £500, and their vendee brought ejectment against the widow and devisee for life of James. She defended for the whole, giving no notice of defence as tenant in common, under sec. 29 of the Ejectment Act, Consol. Stat. U. C. ch. 27. The jury found that the deed of 1863 was voluntary. *Held*, that the effect of the deed of 1855 was to give an undivided moiety of the half lot to James, but that defendant not having limited her defence, the plaintiff was entitled to the postea. *Held*, also, that the prior registration of the deed of 1863 could have no effect, the jury having found it to be without consideration. *Leech v. Leech et al.*, 321.

5. *Competency of witness.*—A. being sued in ejectment suffered judgment by default for want of appearance, and B. was admitted to defend as landlord. *Held*, that A. was not a competent witness, but that, as the verdict was warranted by the other testimony, his reception was no ground for interference. *Dundas v. Johnston et al.*, 547.

6. *Judgment by default—Costs.*—An ejectment summons having been served on A. and B., A. only defended, and B. allowed judgment to



go by default. The plaintiff obtained a verdict and issued a *hab. fac.* and *fi. fa.* for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings; but *Held*, that the plaintiff was right, for as to the *hab. fac.*, if B. claimed no interest in the land, and was not in possession, he should have applied on receiving the summons to have his name struck out; and as to the *fi. fa.* for costs, he was liable, for although if sole defendant he would not have been, yet when there are two persons in possession and one appears, the judgment is suspended till the trial of the issue; if the latter succeeds it enures to the benefit of the other, and if he fails both are liable for the whole costs, (as in actions for damages,) of which there can only be one taxation. *D'Arcy v. Stephen White and James Wilson*, 570.

*Lease by husband of wife's land—Expiration of term on his death—Effectment.*]—See HUSBAND AND WIFE, 1.

*On mortgage.*]—See MORTGAGE, 1, 2.

See TAXES, 1.—WILL, 1.

## ELECTIONS.

*Municipal Act—Commencement of—Perjury.*]—An Election, under the Municipal Act, is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded.

Where, therefore, in an indictment for perjury, the defendant was alleged to have sworn that no notice of the disqualification of a

candidate for township councillor had been given previous to or at the time of holding the election, the perjury assigned being that such notice had been given *previous* to the election; and the notice appeared to have been given on the nomination of the candidate objected to: *Held*, that the assignment was not proved. *The Queen v. Cowan*, 606.

## EQUITABLE PLEADINGS.

*Plea, set off—Replication, assignment of the claim and notice to defendant.*]—See ASSIGNMENT.

*Action on bond to pay debt due by plaintiff—Plea that plaintiff not damnified, and had paid nothing, held bad.*]—See INDEMNITY, 1.

*Covenant in mortgage—Plea prior mortgage by plaintiff fraudulently concealed—Replication discharge of such mortgage.*]—See MORTGAGE, 3.

*Plea of fraud to action on award.*]—See RAILWAYS AND RAILWAY COMPANIES, 5, 10.

See ROAD COMPANIES.

## ESCAPE.

*Form of action for—Evidence—Damages.*]—Plaintiffs declared against the sheriff for an escape, alleging that defendant took one M. under a *Ca. Sa.* upon a judgment recovered by them, and without their consent voluntarily suffered him to escape, whereby they lost the sum endorsed on said writ, and were otherwise injured. Defendant pleaded not guilty, on which the plaintiffs joined issue. *Held*, that the declaration must be treated as in case, not in debt under the statutes 13 Ed. I. ch. 11, and 1 Rich. II., ch. 12; and that the

damages being therefore open, evidence as to the value of the debtor's custody to the plaintiffs should have been received. *Kingan et al. v. Hall, Sheriff*, 248.

### ESTOPPEL.

*By return to fi. fa.*—See EXECUTION, 5.

*Covenant to indemnify against claim—Recovery against covenantee—Right of covenantor to dispute the judgment.*—See INDEMNITY, 2.

*Against objecting to jurisdiction of J. P., by application to him as such.*—See MALICIOUS ARREST, 2.

*Against ejectment on first mortgage by proviso in second mortgage.*—See MORTGAGE, 2.

*Against disputing legality of fence, after award by fence viewers.*—See FENCE VIEWERS.

### EVIDENCE.

1. *Dower—Plea of release—Secondary evidence of—Previous ineffectual release—Admissibility of evidence relating to—Pleading—Tenant held bound to call the demandant.*—In an action of Dower defendant pleaded that by deed of the 21st of August, 1837, the husband conveyed the land to T. C., and that on the 23rd of April, 1850, the demandant, by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined. The release of the 23rd of April, was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark; and the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence

of his handwriting: See *Clark v. Stevenson*, 22 U. C. R. 575. The defendant therefore proved the execution of the deed of the 21st of August, 1837, which was executed by the demandant, though she was no party to it, and it contained no release of dower. A certificate of two justices was endorsed, dated 2nd of March, 1850, that the demandant had appeared before them and duly barred her dower; and one of them proved that she was examined, executed the deed, and received \$10. T. C., the grantee, proved that she agreed to bar her dower, and that he took her to the justices for that purpose, but finding that the proceeding before them was ineffectual, he had the release of the 23rd of April, 1850, prepared, and sent it to her by defendant, with a note for \$40 which he held against her husband, to be kept if the release was executed, otherwise returned; and that T. C. brought back to him the release apparently executed, but not the note. This evidence was received, (though objected to,) as tending to strengthen the probability that the release really was executed; it being also sworn, in confirmation, that the demandant's name to the release was written by her husband: that in May following the demandant told a witness that defendant had been to her to sign a paper for T. C., which she had signed; and that the next day she told defendant she had no rights there. The jury found for defendant.

*Draper, C. J.*, doubted whether there was sufficient to go to the jury as evidence of the execution of the release; but *held, Morrison, J.*, concurring, that defendant, being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have

given the best, notwithstanding her adverse interest; and that the verdict must therefore be set aside. *Morrison, J.*, thought the evidence objected to inadmissible, as being irrelevant to the issue. *Hagarty, J.*, dissented, holding that the evidence was properly received as forming part of the history of the whole transaction, and tending to shew why the release was for a nominal consideration only, and in a form implying a previous conveyance of the fee, which might otherwise have given rise to suspicion; and that defendant was not bound to call the demandant. *Clark v. Stevenson*, 200.

2. *Deed—Secondary evidence—Proof of search—Memorial* ]—*B.* was absent from the country, and the plaintiff proved a search with several of his relatives for the deed from *P.* to him, but it was not shewn that *B.* had lived or left the charge of his papers with any of them. Secondary evidence being then admitted, subject to objection, he proved the existence of this deed, and the execution by *P.* of a memorial of it, which the deputy registrar produced. *Held*, that the search was not sufficient to let in secondary evidence; and if it had been, *quære*, whether the memorial would have proved the deed as against defendant. *Covert v. Robinson*, 282.

*Of execution of award.*]—See ARBITRATION AND AWARD, 1.

*Of waiver of notice of dishonor.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Of conveyance by Canada Company.*]—See CANADA COMPANY.

*Of collateral stipulation in addition to written contract.*]—See CONTRACT, 1.

*Of proceedings in Division Court.*]—See DIVISION COURT.

*Of trespass, to make defendant a joint trespasser.*]—See DIVISION COURT.

*Of title in ejectment.*]—See EJECTMENT.

*Tenant in ejectment not admissible as witness for landlord defending.*]—See EJECTMENT, 5.

*Necessity for proof of judgment in action for false return.*]—See EXECUTIONS, 5.

*Of character—When admissible in slander.*]—See LIBEL AND SLANDER.

*Of reasonable and probable cause.*]—See MALICIOUS ARREST, 1.

*To prove an award fraudulently exorbitant—Witnesses as to value not before the arbitrators not admissible.*]—See RAILWAYS AND RAILWAY COMPANIES, 10.

*Of time when debt contracted.*]—See SHERIFF, 2.

*Of surrender by operation of law.*]—See SURRENDER.

*Entries made by deceased persons.*]—See TAXES, 2.

See DOWER, 2.—ESCAPE.—HUSBAND AND WIFE.—INSURANCE, 2.—JUDGMENT.—LANDLORD AND TENANT.

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## EXCHANGE.

*Of lands—Plea of.*]—See DOWER, 1.

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## EXECUTIONS.

1. *Priority—Sale after appointment of new sheriff—Action for false return—Fraud in not defending action.*—Action against the sheriff for false return to a *fi. fa.*, the question



being whether the writs standing before the plaintiff's were in defendant's hands to be executed, and whether one of them was not fraudulent. The plaintiff's writ was delivered to defendant on the 19th of May, 1864. The previous sheriff had been superseded on the 9th of March, and defendant appointed on the 11th. There had been two previous writs, at the suits of B. and J., respectively, in the hands of the late sheriff, and received by the defendant before the plaintiff's writ. The bailiff, who held a warrant from the late sheriff to execute B.'s writ, sold some of the goods to B. at a valuation, on the 8th of April, for about the amount of his execution, without any auction, or any notice, or bill of sale; and B., being advised that this sale was ineffectual, purchased the same and other goods at the sale made by defendant on the 17th of June, under his own and J.'s writ, which absorbed all the proceeds. The deputy of the late sheriff swore that this bailiff's warrant had been countermanded on the 12th of March, and it did not appear that the execution of the writ had been commenced before defendant's appointment. *Held*, that the plaintiff could not recover, for the sale by the bailiff of the late sheriff to B. was, under the circumstances, a nullity, and the writs of B. and J. were in defendant's hands to be executed before that of the plaintiff.

It appeared that B.'s judgment was made up for the most part of notes on which he was liable for the defendant in the execution, but which he had not then paid. The defendant had not defended B.'s action, though he had for a time defended that of the plaintiff. *Held*, that this conduct did not of itself

avoid the judgment, and that the jury were warranted in finding it not fraudulent. *Snarr v. Waddell, Sheriff*, 165.

2. *Alias Fi. Fa. lands*—*When sale may take place under.*—*Held*, conforming to previous decisions in this court—*Nickall v. Crawford, Tay. Rep.* 376, and *Ruttan v. Levisconte*, 16 U. C. R. 500—that where a *fi. fa.* against lands had been in the sheriff's hands for twelve months, and returned, nothing having been done upon it, the sheriff might sell under an alias writ issued thereon without waiting for a year from its receipt. *Campbell v. Delihanty et al.*, 236.

3. *Sale of lands under execution*—*Ejectment under sheriff's deed*—*Defects in the advertisement*—*Effect of*—*Proof of judgment.*—*Errors or defects in the advertisements*, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title, even if he be one of the execution creditors. In ejectment upon a sheriff's deed for land sold on execution, it appeared that the sale had been duly advertised in a local paper for three months before the 27th of August, 1864; and that an advertisement incorrect in some particulars had been inserted in the *Gazette* of the 11th of June, 1864, and four next numbers, the errors being corrected in the sixth insertion—all these advertisements being of a sale on the 27th of August. On the 1st of October following, and in the five next numbers, the sale was advertised in the *Gazette* for the 12th of November, not as a postponement of the previous sale; but this was not published in a local paper, and though notice of it was put up on the door of the court house, it was not shewn to have

continued there for three months, *Held*, that these advertisements could not be considered a compliance with the statute, C. S. U. C., ch. 22, sec. 267, but that the defects would not affect the purchaser's title. *Paterson v. Todd*, 296.

4. *Fi. fa. lands—Inception of execution.*—Lands were advertised under F's execution in a local paper on the 10th of September, 1863, while the writ was current, but not in the official *Gazette* until the 19th, four days after it had expired. *Held*, that there had been no sufficient commencement of the execution to enable it to be completed by sale and conveyance of the lands under it. *Hazlitt v. Hall*, (Sheriff) 484.

5 *Priority—False return to fi. fa. Necessity for proof of judgment.*—An *al. fi. fa.* at the suit of B. was received by the then sheriff, F., on the 26th of September, 1861, and having been renewed was returned on the 7th of September, 1863, goods on hand 1s. and *nulla bona* as to the residue. This return was made at the request of B.'s attorney, although there had been no seizure, as the attorney doubted whether the *fi. fa.* could be renewed a second time. On the 22nd a *ven. ex.* and *fi. fa.* residue was delivered to the same sheriff, and remained with him until his removal from office on the 10th of March, 1864, when defendant was appointed, but no transfer of the writ to him by indenture was made until the 9th of May following. On the 15th of April, 1864, the plaintiff's *fi. fa.* came in, and soon after the debtor's interest in certain crops was sold, and the proceeds paid over by defendant to B., who indemnified him. The plaintiff thereupon sued the sheriff for falsely returning his writ

*nulla bona*, contending (among other things) that the return to B.'s *al. fi. fa.* being false to B.'s knowledge and procured by him, the *ven. ex.* and *fi. fa.* founded upon it was void. There was no evidence of any fraud; and it appeared that B.'s writ had been placed and continued in the sheriff's hands for execution. The reason assigned for the long delay in acting upon it was that the debtor's goods had been sold under execution in 1861, and were supposed to be exhausted. *Held*, (affirming the judgment of the county court,) that B.'s writ had priority, for the return, though not true in fact, bound the late sheriff and the bank, and could not prejudice the plaintiff. *Held*, also, that defendant was not bound to prove the judgment on which B.'s writ was issued, and that his being indemnified by B. could make no difference in this respect. *Robinson v. Waddell* (Sheriff), 488.

6. *Writs against goods and lands—Right to issue concurrently—Practise—Right to move.*—A plaintiff cannot at the same time deliver to the same sheriff a writ against goods and another against lands, both to be acted upon. The plaintiff issued a writ against defendants' goods to the sheriff of W., which on the 22nd of April was returned *nulla bona*, with the consent of one of the defendants, and on that day *fi. fas.* against lands issued to the same and to other sheriffs, and an *alias fi. fa.* goods to the sheriff of W., on which latter writ he seized certain stock. A motion to set aside these writs was made on behalf of two of the defendants, and of the Bank of British North America, to whom they had given a mortgage of lands on the 17th of May, 1865, the objections being that there had been no proper issue

and return of writs against goods, and that the writs against lands and goods were concurrent. *Held*, that the return of *nulla bona*, if any of the defendants had goods, could be only an irregularity, against which the Bank could not move, nor the defendant who had consented to it; but *held*, also, that as the alias writ against goods issued on the same day as the writs against lands, and had been acted upon, the latter writs were under the circumstances illegal, and must be set aside. *Held*, also, that the mortgage to the Bank could not have prevailed against the writs, which bound the lands from their receipt by the sheriff, *Semble*, that one of several defendants may insist that the goods of the others shall be exhausted before a writ issues against his lands. *Quære*, whether this application could have been entertained on the part of the Bank. *Semble*, not. *Ontario Bank v. Muirhead et al.* and *v. Kerby et al.*, 563.

7. *Partnership—Rights of execution creditor of one partner.*]—V. and J. D. being in partnership, J. D. went out, and his father D. D. took his place in the firm. About six months after this V. assigned to D. D. all the stock in trade, but possession was not changed, nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue, to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after the plaintiffs' title accrued did not appear. *Held*, that they must succeed: that they were clearly entitled to the goods themselves, for defendant as creditor of one partner could not seize them out of the possession of

the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts. *Wilson et al. v. Vogt*, 635.

*Exemption of goods from.*]—See SHERIFF, 2.

See JUDGMENT.

## EXECUTORS.

*Power of sale vested in.*]—See WILL, 1.

## FALSE RETURN.

See EXECUTIONS, 1, 5.

## FENCES.

*Liability of sub-lessee of R. W. for neglect to maintain.*]—See RAILWAYS AND RAILWAY COS. 1.

*Lessees of land may sue as "proprietors" for such neglect.*]—See RAILWAYS AND RAILWAY COS. 6.

## FENCE VIEWERS.

*Effect of their award—C. S. U. C., ch. 54, sec. 360.*]—Defendants having impounded the plaintiff's horses for getting into his field, the matter was referred to the fence viewers of the township, who awarded that defendants' fence was lawful, and appraised the damage. The plaintiff replevied, and desired to prove that the defendants had put up the fence higher after the horses got over and before the award. *Held*, (affirming the judgment of the County Court) that under Consol. Stat. U. C., ch. 54, sec. 360, the award was conclusive as to the legality of the fence at the time of the alleged trespass. *Short v. Parmer et al.*, 633.



## FI. FA.

See EXECUTIONS.

## FRAUD.

*In obtaining award—May be pleaded on equitable grounds.*]—See RAILWAYS AND RAILWAY COS., 5.

*Evidence in support of such plea.*]—See RAILWAYS AND RAILWAY COS., 10.

*Arguments used to enhance plaintiff's claim cannot be a fraud.*]—See RAILWAYS AND RAILWAY COS., 10.

See EXECUTIONS, 1.—MANDAMUS. —MORTGAGE, 3.—REGISTRY, 2. ROAD COMPANIES.

## FRAUDULENT REPRESENTATION.

*Railway Company—Warehouse receipts—Error in quantity—Liability to third persons.*]—Defendants, a railway company, gave warehouse receipts to one B. for 7500 barrels of flour as in store for him, on the faith of which the plaintiffs accepted and paid bills drawn upon them by B.; and there being a deficiency of 192 barrels, they sued defendants as for a false and fraudulent representation made by them, which they knew would, in the course of trade, be relied upon by persons dealing with B. The evidence shewed defendants knew such receipts were commonly used to obtain advances of money upon, and that they sometimes gave receipts to B. for flour in advance, on being told that it was on the way; but how the mistake in question occurred was not shewn. *Held*, that upon this evidence there was a case to go to the jury in support of the declaration, and that a verdict for the plaintiffs must be allowed to stand, although

they might well have found otherwise. See the former report of the case, 23 U. C. R. 448. *McLean et al. v. The Buffalo and Lake Huron Railway Company*, 270.

## GOODS SOLD.

See SALE OF GOODS.

## HABEAS CORPUS.

1. *Conviction by Police Magistrate, under C.S.C. ch. 105, for keeping a disorderly house—Habeas Corpus—Objections available on application for discharge—Police limits, &c.*]—The prisoner was convicted by the Police Magistrate for the city of Toronto, for that she “did on,” &c., “at the said city of Toronto, keep a common disorderly bawdy house on Queen Street, in the said city,” &c., and committed to gaol at hard labour for six months. A *habeas corpus* and *certiorari* issued; in return to which the commitment, conviction, information and depositions were brought up. On application for her discharge:—

*Held*, 1. No objection that the commitment stated the offence to have been committed on the 10th of August, instead of the 11th, as in the conviction, the variance not being material to the merits.

2. Nor that the commitment charged that the prisoner “was the keeper of,” &c., and the conviction “that she did keep,” both differing from the statute, which designates the offence as “keeping any disorderly house,” &c., for all these expressions convey the same idea.

3. Nor that the commitment did not shew that the offence was committed within the “police limits” of the city, the words used in the act, C. S. C., ch. 105, sec. 14—for

there was no ground for supposing any difference between these and the ordinary city limits.

4. Nor that there was nothing to shew whether the prisoner pleaded to the charge or confessed it.

5. Nor that the conviction was not sustained by the information, the latter being that defendant was the keeper of a disorderly house, and the former for keeping a common disorderly bawdy house—for the commitment would not be void because of a variance between the original information and the conviction made after hearing evidence.

6. Nor that no notice had been put up as required by sec. 25 of the same act, to shew that the court was that of the police magistrate, not of an ordinary J.P.—for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice.

7. Nor that there was no evidence to warrant the conviction—for when a proper commitment is returned to a *habeas corpus*, and there was evidence, the court will never enter into the question whether the magistrate has drawn the right conclusion from it.

8. Nor that the offence of keeping a common disorderly bawdy house was not sufficiently certain—for the legal meaning of the last two words is clear, and if keeping a disorderly house be no offence, the addition of that would be only surplusage.

*Semble*, that on an application like this affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him; but that such

conduct may furnish ground for a criminal information.

*Quære*, with regard to some of the objections, whether the court, on such an application, can go behind the warrant of commitment?

*Quære*, also, whether the *certiorari* properly issued without complying with the requirements of 13 Geo. II., ch. 18, though the object was not to quash the conviction. *Regina v. Emily Munro*, 44.

2. *Practice court*—*C.S.U.C. ch. 10, sec. 9.*—A judge in Practice Court has no authority to grant a rule nisi for a *habeas corpus ad subjiciendum*; and where such rule had been issued there returnable in full court, it was discharged on this preliminary objection. *Regina v. Smith*, 480.

## HARBOUR COMPANIES.

*Harbour companies.*—Remarks as to the duty of harbour companies to keep the harbour free from obstructions, and their liability for neglect. In this case the question whether the obstruction which caused the loss of the plaintiff's vessel was an act of negligence on defendants' part, was left to the jury upon conflicting evidence, and the court refused to interfere with a verdict in their favor. *Berryman v. The President, Directors, and Company of the Port Burwell Harbour*, 34.

## HUSBAND AND WIFE.

1. *Separate estate*—*Lease*—*Conveyance.*—M. conveyed the land in question to J., the wife of R. R. alone executed a lease to the defendant, and died during the term, before his wife. *Held*, that on R.'s death the term expired, and that the

plaintiff, claiming under a conveyance from R. and his wife, could eject defendant without notice to quit or demand of possession. The conveyance to the plaintiff was executed by the husband and wife at different places, but so far as appeared on the same day, and it was duly certified by two justices, under C. S. U. C. ch. 85. *Held*, a sufficient execution by her "jointly with her husband." *Burns v. McAdam*, 449.

2. *Married Women's Act, C. S. U. C., ch. 73—Construction of—Property purchased after marriage out of the wife's separate estate.*—In an interpleader issue the plaintiff, a married woman, claimed goods seized under an execution against her husband. It appeared that the property consisted of stock, farming implements, and growing crops, and was seized upon a farm on which she and her husband were living, and which had been devised by the plaintiff's father to trustees for her benefit, the rents to be payable to her for her separate use; and that most of it, except the crops, had been purchased by the husband at sales, but paid for by the claimant out of the rents of other lands devised in the same manner. She had been married before the 4th of May, 1859, without any settlement. *Held*, in the absence of any evidence to the contrary, that the reasonable presumption was that the husband was tenant of the land, and, if so, the crops would be his. 2. As to the other property, that, apart from our statute, it would not be the claimant's merely because it had been purchased by money which belonged to her under the will. 3. That as to the statute, it should be construed as creating a settlement before marriage in the terms of the first and second sections;

and if in this case the property was bought by the wife to enable her husband to carry on the farm for his own benefit and that of his wife and family, it would be liable to satisfy his debts.

In the County Court it was left to the jury to say whether the property claimed did not belong to the husband, he having reduced it into possession. *Held*, that this was an insufficient direction, and that their attention should have been drawn more explicitly to the effect of the statute, to the presumption arising from the husband being the head of the family, occupying and farming the land, to the use to which the property was put, and to the wife's apparent object in purchasing it.

*Quære*, if this had been trespass instead of an interpleader, whether the wife could have sued alone? *Lett v. The Commercial Bank of Canada*, 552.

3. T. having the title to land she and her husband brought trespass for injuries to it, and defendants pleaded that the land was not the plaintiffs'. It was objected that there was no joint property to sustain the action; but *Held*, that the objection was not available as ground of non-suit. *Quære*, whether it could have been taken advantage of on demurrer or in arrest of judgment. *Tucker et ux v. Phillips et al*, 626.

*See* DOWER.—SEDUCTION.

—◆—  
ILLEGALITY.

*See* CHAMPERTY.

—◆—  
INDEMNITY.

1. *Bond to pay plaintiff's debt—When liability accrues—Equitable*



*replication, plaintiff not damnified—Pleading.*—Where A. is liable to pay B. a certain sum on a particular day, and C. covenants with A. to pay it, A. on default may recover the whole sum from C. although he has paid nothing.

The plaintiff conveyed land to B., subject to a mortgage to one S., which contained a covenant to release in parcels. The plaintiff had previously sold to N. part of the land mortgaged, and B. agreed to release this part by a day named, and pay off the mortgage as it should fall due. Defendant gave his bond to the plaintiff conditioned that B. should do this. To an action on the bond, averring B.'s default in both respects, defendant pleaded, on equitable grounds, that the bond was given only to indemnify the plaintiff from damage by B.'s non-performance: that the plaintiff had not paid or been called upon to pay anything, and had suffered no damage: that the defendant was ready to indemnify him according to the true meaning of the bond; and that he ought not in equity to enforce it until he had been damnified. *Held*, on demurrer, no defence. *Held*, also, that such a bond was clearly within the 8 and 9 Wm. III.

In declaring on a bond it is not necessary to allege it to be under seal. *Leith v. Freeland, Executrix*, 132.

2. *Assignment of lease—Covenant by assignee to indemnify—Action by lessee upon—Right to recover costs of suit brought by lessor—Interest.*—Defendant took an assignment of a lease from the plaintiff, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered,

defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence. *Held*, that under defendant's covenant to indemnify him, the plaintiff was entitled to recover the damages and costs in that suit, but not to interest.

When there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering, *Quære*, whether, when sued on the covenant, he can dispute the liability of the covenantee to the damages so recovered.

Interest is in practice much more frequently allowed by our juries than English authority would seem to warrant.

Want of direction is no ground for a new trial, unless the verdict is against evidence. *Spence v. Hector*, 277.

## INDICTMENT.

See *TORONTO STREET RAILWAY COMPANY.*

## INQUISITION.

*Coroner's inquisition—Imputations—Refusal to quash—Entitling affidavits.*—A coroner's jury found the cause of a death into which they were inquiring to have been disease, adding that it was accelerated by an overdose of certain drugs taken in excess, and improperly compounded, prescribed and administered by one F. as a cholera preventative; and that F. was deserving of severe censure for the gross carelessness displayed by him in such compounding and prescribing. This inquisition having

been brought up by *certiorari*, granted on the application of F., the court refused to quash it, holding that the imputation which it contained, not amounting to any indictable offence, gave him no right to have it quashed, and that, under the circumstances, public justice did not require their interference. *Quære*, whether the affidavits were properly entitled *The Queen, plaintiff, v. Robert Farley, defendant. The Queen v. Farley*, 384.

## INSURANCE.

1. *Fire—Policy on goods—Insurable interest.*—The declaration alleged, in substance, that the plaintiff insured certain goods with defendants, which he afterwards sold to C., to whom with defendants' assent he assigned the policy: that C. sold them to M., taking in part payment his, M.'s notes, which L. endorsed for his accommodation, on a verbal agreement that the goods should be sold by M., and the proceeds as received paid over to L. to retire the notes, and the policy be assigned to L. in trust to secure him against the notes, and pay any surplus to M.: that it was so assigned to L. with defendants' assent and knowledge of all the facts: that M.'s interest in the goods and L.'s liability on the notes continued up to the time of the loss, and that the plaintiff was interested as trustee for them. A loss was then alleged, and non-payment either to the plaintiff or to M. or L. *Held*, on demurrer, that the declaration shewed no right of action, for that L. had no insurable interest in the goods, and M. was a stranger to defendants, the policy never having been assigned to him. One condition of the policy was, that

"In case of loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proof of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made," &c. *Quære*, as to the exact meaning of such condition. *Davies v. The Home Insurance Co.*, 364.

2. *Life insurance—Omission to insert in the policy the name of the person interested*—14 Geo. III., ch. 48—*Right to recover back premiums.*]

—A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half-yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife they would hold the insurance money for the survivor and for their children. *Held*, that such policy was illegal, under 14 Geo. III., ch. 48, sec. 2, for the name of the person interested therein, or on whose account it was made, was not inserted in it *as such*: and the declaration of trust, which shewed that the plaintiffs had no interest, could not be incorporated as part of the policy. *Held*, also, that the plaintiffs might recover back the premiums, the omission to comply with the statute not being a "*delictum*" on their part, so as to make the maxim "*in pari delicto*," &c., applicable; but that they could recover only the first premium paid, the other payments not appearing upon the evidence to be made by them and their own money. *Held*, also, that it was unnecessary for the plaintiffs to produce the declaration referred to in the policy as

the basis of the contract. *Dowker and Armour v. The Canada Life Assurance Co.*, 591.

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### INTEREST.

*Right to recover under covenant to indemnify.*]—See INDEMNITY, 2.

*Statement and proof of, in fire and life insurance.*]—See INSURANCE.

*Allowed on money not paid over by sheriff.*]—See SHERIFF, 2.

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### INTERPLEADER.

*Second application by sheriff on renewed claim by same person—Restraining action against claimant or his attorney—Practice in sending papers filed to nisi prius.*]—Papers filed in court should not be sent away to be used as evidence at *Nisi Prius*, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission; and in that case the officer sending should take a voucher from the officer receiving them.

Certain goods were seized in December, 1862, under an execution against S. W. S., his son, claimed them as the partnership goods of S. under the same writ. An interpleader summons obtained by W. S. was discharged on the 13th of January, 1863, and he was debarred from any action against the sheriff for the seizure. He then claimed the goods as his sole property, and another interpleader summons having been obtained, an order was made upon it on the 30th of January, 1863, directing the sheriff to withdraw on certain conditions being fulfilled, in

default of which he should sell, and no action be brought against him for such sale or the seizure; and (after certain directions as to security for costs) that the defendant should be barred from any action against the plaintiffs' attorneys or the plaintiffs for the seizure, or for any sale to be made under such order. The son applied for further time to comply with the terms of this order, and having failed in such compliance, the sheriff sold. The papers filed on these applications were handed by the clerk in Chambers to the clerk of assize at the spring assizes in Toronto for 1863, to be used at the trial of a cause in which the son was plaintiff, and were mislaid. On the 7th of March, 1863, before the time for compliance with the second order had expired, a rule was obtained to set aside the two interpleader orders; but it was enlarged, owing to the loss of the papers, until Michaelmas Term following, and then allowed to lapse, the court refusing to allow it to be supported on verified copies. On the 16th of January, 1864, the papers were found, and W. S. obtained a rule *nisi* to rescind the two interpleader orders, or to revive the previous rule of the 7th of March, 1863. The interpleader issue directed had never been proceeded with by him. The court refused to interfere, holding, 1. That the sheriff was entitled to interplead the second time, the claimant having alleged a different title from that on which the first summons was obtained, claiming first as partner and next as sole owner. 2. That the second order, restraining an action against the execution creditors and their attorneys, was authorized and proper; and the loss of the papers, therefore, in consequence of which the first application against it lapsed, formed



no ground for interference. *Gaynor et al. v. Salt*, 180.

*In Division Court—Proof and effect of the adjudication, &c.*—See DIVISION COURT.

See EXECUTIONS, 6.—HUSBAND AND WIFE, 2.—JUDGMENT.—NEW TRIAL, 2, 3.

## JOINT STOCK COMPANIES.

See ROAD COMPANIES.

## JUDGMENT.

1. *Voluntary conveyance—Sheriff's sale—Title claimed under—Right of defendant to impeach conveyance and require proof of judgment.*—Interpleader, to try the right to certain shares in a schooner, seized under an execution at the suit of the defendant against W. S. Marsh, on the 2nd of April, 1863. The plaintiff's title arose thus: 1. On the 27th of April, 1859, W. S. Marsh made a voluntary conveyance to his son. 2. On the 5th of March, 1860, the sheriff, under a *ven. ex.*, against W. S. Marsh, sold to Schuyler Marsh. 3. The son on the 24th of March, 1863, confirmed this title by a voluntary deed to Schuyler Marsh, who on the same day conveyed to the plaintiff. Schuyler Marsh had in December, 1861, mortgaged to one T., who on the 28th of March, 1863, assigned to the plaintiff. All these conveyances were duly registered at the custom house. The defendant objected that a judgment should have been shewn to support the *ven. ex.*, and he desired to prove fraud affecting the sheriff's sale, by shewing that W. S. Marsh supplied the money then paid; but it was not denied that the plaintiff was a *bonâ fide* purchaser for value without

notice. *Held*, that the defendant, who so far as appeared was not a creditor of W. S. Marsh until long after the deed to his son, and who was a stranger to the judgment on which the *ven. ex.* issued, was not in a position to impeach the plaintiff's title, or to require that such judgment should be proved. *Vindin v. Wallis*, 9.

2. *Proof of.*—Judgments may be proved at *nisiprius* by producing the original roll, as well as by exemplification, but the clerk should not produce such roll without proper authority. *Paterson v. Todd*, 296.

*Right to enter after allowance of bond on appeal.*—See APPEAL, 3.

*On interpleader summons in Division Court—Proof and effect of—Informality.*—See DIVISION COURT.

*Necessity for proof of by sheriff in action for false return.*—See EXECUTIONS, 5.

## JURISDICTION.

*Of Police Magistrate.*—See HABEAS CORPUS, 1.

*In Interpleader, to restrain actions.*—See INTERPLEADER.

*Of Justices of the Peace.*—See JUSTICES OF THE PEACE, 2, 3.

*Where magistrate acts out of his county, liable in trespass, not case.*—See MALICIOUS ARREST, 2.

## JURY.

*Improper conduct in defendants, in taking jury to view premises—Waiver of by plaintiffs.*—See RAILWAYS AND RAILWAY COS., 10.

*Sheriff's fees on summoning jurors.*—See SHERIFF, 1.

# JUSTICES OF THE PEACE.

1. *Oath of qualification*—*C.S.C. ch. 100*.—Under *C. S. C. ch. 100*, sec. 3, the oath of qualification by a Justice of the Peace must be taken before some J. P. of the county for which he intends to act. It cannot be administered by the Clerk of the Peace for such County, under the writ of *dedimus potestatem* issued with the commission of the peace. *Herbert qui tam v. Dowsnell*, 427.

[See 29 Vic. ch. 12, since passed.]

2. *Action against J.P.*—*C.S.C. ch. 103*, sec. 67—*C.S.U.C. ch. 126*.—Defendant, a justice of the peace, issued his warrant, under *C. S. C. ch. 103*, sec. 67, to commit the plaintiff for thirty days for non-payment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment and conveying the plaintiff to gaol should be sooner paid; but he omitted to state in the warrant the amount of the costs of the distress and commitment. The plaintiff having been committed on this warrant sued defendant for false imprisonment. *Held*, that though it was the duty of the justice to ascertain and state such amount, yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not shew either a want or an excess of jurisdiction, but rather an irregular exercise of it; and that defendant therefore was not liable in trespass. *Held*, also, that the determination as to these costs was clearly a judicial and not merely a ministerial act. *Dickson v. Crabb*, 494.

3. *Action against J. P.*—*Conviction under C.S.C. ch. 92*, sec. 18—*Right to commit without distress*—*C. S. C. ch. 103*, secs, 57, 59, 62,

*C. S. U. C. ch. 126*.—Defendant, a justice of the peace, convicted the plaintiff under *C. S. C. ch. 92*, sec. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to the defendant, and a boy living with his parents, and having no property. *Held*, that the action would not lie, for defendant was authorized by *C.S.C. ch. 103*, sec. 59, to commit in the first instance, that statute applying to this conviction; and the warrant was sufficient, as it followed the form given by the act, which contains no recital of the ground for not first issuing a distress. *Quære*, whether defendant would have been liable if he had not proved, as he did, the facts which justified him in dispensing with distress.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount. *Held*, following *Dickson v. Crabb*, ante, page 494, that this would not make defendant a trespasser. *Moffat v. Barnard*, 498.

See HABEAS CORPUS, 1.—MALICIOUS ARREST, 2.—MUNICIPAL CORPORATIONS, 3.

## LAND.

*Lands—Liability for debts.*—The liability of lands for debts under 5 Geo. II. ch. 7, is not affected by the death of the debtor. He, or his heir or devisee after his death, may sell and convey to a *bonâ fide* purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against

lands issued upon it; and such purchaser will have a good title as against creditors.

*Levisconte v. Dorland*, 17 U. C. R. 437, remarked upon. *Reid v. Miller*, 610.

*Agreement to clear—Assignment of not under seal—Right of assignee to crop.*—See CONTRACT, 3.

*Description of.*—See DESCRIPTION OF LAND.

*Sale of under Execution.*—SEE EXECUTIONS, 2, 3, 4, 7.

*Injuriously affected by Railway—Arbitration.*—See RAILWAYS AND RAILWAY COMPANIES, 5, 10.

## LANDLORD AND TENANT.

*Trespass—Right of way—New assignment—Breach of covenant by lessee—Effect of parol permission by lessor.*—Declaration for breaking and entering the plaintiff's close, part of the east half of a lot in the township of Blanshard. *Plea*, that defendant leased the land to plaintiff, by a deed in which it was covenanted that defendant should have a road along the west side of the premises, extending from the highway at the south to defendant's land at the north: that at the time of the demise there was a fence on the east side of this road, which fence the plaintiff covenanted to keep in repair, but that he did not do so, whereby, and without defendant's default, defendant's cattle strayed from the road on to the plaintiff's land, which are the alleged trespasses. On this the plaintiff took issue.

At the trial the lease was put in, by which the defendant demised twenty-five acres of the east half of the lot to the plaintiff. It contained an agreement that defendant

should have a road on the west side of the land demised, and a covenant by plaintiff to repair the fences. When this lease was executed there was a fence running from east to west across the east half, but too far south to leave the defendant twenty-five acres, and it was therefore removed further north by the act of both plaintiff and defendant, when it formed the boundary line between them. There was a line fence dividing the east from the west half of the whole lot, and adjoining it on the east was the right of way reserved; with a fence separating it from the rest of the land leased. This fence ran to the original north fence, but was not extended so as to join it when that fence was moved. The north fence in its new position joined the line fence between the east and west halves, but there was contradictory evidence as to whether it did so originally, or extended only to the road reserved, leaving the north end of such road open. The fence separating the road from the land leased was removed by plaintiff, with defendant's express assent, if not by his directions. The defendant, for some time, when he required to use the road, took down and replaced the fence at the north end of it, but after harvest he left it down, and continued to do so from time to time, when it was put up again by the plaintiff. His cattle thus got on the plaintiff's land, which was the trespass complained of.

*Held*, that the removal of the fence by plaintiff would *primâ facie* excuse a trespass *extra viam*, which the plea admitted, and that if defendant's consent to such removal would prevent him from setting it up as a wrongful act, the consent should have been replied.



*Seemle*, however, that unless defendant himself caused the removal so as to make it his own act and not the plaintiff's, it would be a breach of the covenant; and the evidence here amounted only to a permission. *Held*, also, that as it was necessary to take down the north fence to use the right of way, this act justified the single act of trespass charged, and the plaintiff should have new assigned, if he relied upon excess in the quantity taken down, or in leaving the space open too long.

The plaintiff, therefore, on the pleadings and evidence, was held not entitled to recover. *Pickard v. Wixon*, 416.

See EJECTMENT, 5.—HUSBAND AND WIFE, 1.—RAILWAYS AND RAILWAY COMPANIES, 1, 6.—SURRENDER.

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### LEASE.

See HUSBAND AND WIFE, 1.—LANDLORD AND TENANT.—INDEMNITY, 2.—SURRENDER.

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### LIBEL AND SLANDER.

*Evidence of character—Justification—New trial.*]—In an action for slander imputing theft, defendant having pleaded and endeavored to support pleas of justification: *Held*, that evidence of the plaintiff's general bad character for honesty was properly rejected.

*Seemle*, per *Hagarty, J.*, that it would have been inadmissible even without the justification; but that, if not guilty only be pleaded, defendant may shew, solely in mitigation of damages, and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood

that defendant had been guilty of the specific offence charged.

The evidence in support of one of the pleas of justification was very strong, sufficient to have warranted a conviction if the plaintiff had been on his trial. The charge, however, was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and \$150 damages, the court refused to interfere. *Edgar v. Newell*, 215.

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### LIFE INSURANCE.

See INSURANCE, 2.

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### LIMITATIONS (STATUTE OF)

*Title by possession—Possession of part only—Effect of.*]—Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot. It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion; and *Held*, that in this case there was evidence legally sufficient to warrant such inference.

*Seemle*, that a "squatter" will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as

the person in possession. *Dundas v. Johnston et al.*, 547.

See DOWER, 1.

## LOSS.

*Of papers filed.*]—See INTERPLEADER.

*Of luggage—Liability of railway companies for.*]—See RAILWAYS AND RAILWAY COMPANIES, 7.

*By accidental fire, of goods sold.*]—See SALE OF GOODS.

## MAGISTRATE.

See JUSTICES OF THE PEACE.

## MAINTENANCE.

See CHAMPERTY.

## MALICIOUS ARREST.

1. *Reasonable and probable cause—Evidence of—When to be left to the jury.*]—Plaintiff sued defendant, in the first count, for maliciously and without reasonable or probable cause procuring him to be arrested, by a false affidavit that defendant had a cause of action against him for the seduction of his daughter; and in the second count for effecting the same object by falsely, &c., representing that he was about to quit Canada, with intent, &c. The plaintiff established a *prima facie* case on both counts, in answer to which defendant proved that he was present when his daughter made an affidavit before a J.P. that she was pregnant by the plaintiff: that he had been informed of statements made by the plaintiff affording a very strong inference of improper intercourse: that he was told the plaintiff had said he

had “signed away” his place; and that he, defendant, had received a letter from the plaintiff’s cousin, condemning the plaintiff for not marrying defendant’s daughter, and telling defendant that it was his duty to look after him, as he was going to sell his place, and wanted to sell it to the writer. *Held*, that these facts sufficiently shewed reasonable and probable cause: that as they were uncontradicted, there was no question for the jury; and that the plaintiff therefore was properly non-suited. *Riddell v. Brown*, 90.

2. *Malicious prosecution—Action for—Magistrate acting out of his county—Trespass maintainable, not Case.*]—The declaration alleged that defendant falsely and maliciously, and without any reasonable or probable cause, procured one H. to appear before a magistrate, and charged defendant with obtaining money from Z. and others by false pretences, and upon such charge procured the magistrate to issue his warrant, and under it caused defendant to be arrested and brought before the magistrate, who having heard the charge dismissed it, and discharged him.

At the trial it appeared that the offence was alleged to have been committed by the plaintiff in the county of Middlesex, but the charge was made and the warrant issued in the city of London, by a J.P. for the county only, not for the city. *Held*, that as the magistrate, acting out of his jurisdiction, had no authority whatever, the action was misconceived: that it was as if defendant had himself directed the arrest; and that trespass, therefore, not case, was the proper remedy; and a non-suit was ordered. *Held*, also, that defendant

was not precluded from objecting to the magistrate's jurisdiction, by having caused the application to him as such, there being nothing to shew that he did not really believe him to have authority. *Hunt v. McArthur*, 254.

## MALICIOUS PROSECUTION.

See MALICIOUS ARREST, 2.

## MANDAMUS.

*Fraudulent use of—Attachment—Practice.*]—The affidavits stated that M., who claimed the office of registrar, obtained a mandamus *nisi*, directed to H., to deliver up to him the books and papers: that he went to the office with two constables, in H.'s absence, and demanded them of his wife, reading what purported to be a *peremptory* mandamus as his authority, but refusing to allow her or her solicitor to examine it; and they then took away the books, &c. Upon these affidavits the court granted a rule *nisi* for an attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud. A rule for an order on M. to restore the books, &c., thus obtained, was refused, as H. might bring trespass, claiming a mandamus in the action; and where full redress can be had by an ordinary suit, application for summary remedies should not be encouraged. A writ of replevin had previously been refused. *In re John McLay, John Robinson, and Donald Robinson*, 54.

See SHERIFF, 1.

## MARRIED WOMEN.

See HUSBAND AND WIFE.

## MEMORANDA.

*Calls to the Bar*—65, 199, 356, 493.

## MEMORIAL.

*Effect of as evidence of deed.*]—See EVIDENCE, 2.

*Addition of witness omitted in—Registration held bad.*]—See REGISTRY, 1.

## MILEAGE.

*Chargeable by sheriff on summoning jurors.*]—See SHERIFF, 1.

## MISREPRESENTATION.

See FRAUDULENT REPRESENTATION.

## MISTAKE.

*In warehouse receipts—Liability for to third parties.*]—See FRAUDULENT REPRESENTATION.

*In computation, in by-law—Effect of.*]—See MUNICIPAL CORPORATIONS, 1, 2.

## MONEY PAID.

See INSURANCE, 2.

## MORTGAGE.

1. *Mortgage—Default—Ejectment.*]—Defendants mortgaged land to the plaintiffs for the payment of £875, on the 23rd of June, 1864, and interest half-yearly on the 23rd of June and December, with a proviso for entry by the mortgagees after and possession by the mortgagors until default. The interest due on the 23rd of June, 1863, being in arrear, on the 11th of December following the plain-



tiffs brought ejectment. Defendants' attorney paid the interest up to the 23rd of that month, and on the 29th of July following, the principal not having been paid, judgment was entered for want of appearance, and a writ of *Hab. Fac. Poss.* issued. The defendants' attorney swore that this payment was accepted in satisfaction of the suit, which the plaintiffs' attorney denied. *Held*, (rescinding an order made in Chambers,) that the judgment was regular, for the admitted default in the interest vested the land absolutely in the plaintiffs, and the subsequent payment could not divest it; defendants' only remedy being an application for relief under the 7 Geo. 11., ch. 20, or under the last proviso in the mortgage. *Goodeve et al. v. Wallace et al.*, 31.

2. *Proviso for possession by mortgagor until default—Estoppel.*]—Defendant, being lessee for years, with a right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee for £118, payable in six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff; and to an action of ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default. *Held*, that the plaintiff was not estopped, for, 1. The second mortgage might take effect by passing an interest; 2. If the plaintiff was estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large; but, 3. *Semble*, that the re-demise in a mortgage cannot operate, by estop-

pel or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. *Quære*, per *Hagarty, J.*, whether, although the proviso could form no defence to this action, the defendant might not have a remedy elsewhere to prevent such a violation of the plaintiff's personal contract not to disturb his possession. *James v. McGibney*, 155.

3. *Covenant on mortgage—Plea, prior mortgage by plaintiff fraudulently concealed—Replication, discharge of such mortgage.*]—To a declaration on the covenant to pay, contained in a mortgage of lands for the balance of purchase money, defendant pleaded a prior mortgage to B., executed by the plaintiff, and fraudulently concealed from him, which had afterwards been foreclosed, and defendant ejected. The plaintiff replied, in substance, that the mortgage sued on had been assigned to D., for whose benefit the plaintiff was suing, and that, before this action, by indenture between D. and the prior mortgagee, of which defendant had notice, such prior mortgage "was released and discharged." *Held*, on demurrer, that the replication was good, for D., the beneficial plaintiff, having procured the discharge of B.'s mortgage, had removed the only objection urged by defendant, and was in a position to give him a good title. *McDer-mott et al. v. Workman et al.*, 467.

#### MUNICIPAL CORPORATIONS.

1. *By-law—Assent of electors—By-law signed and sealed before obtaining—Place of meeting.*]—A by-law to raise a loan, which required the assent of the electors, was on the 11th of February signed

by the warden, and sealed with the corporate seal, but it recited that the assent of the rate-payers to it was necessary, and contained full provisions for taking their votes. It was published, with a notice, stating it to be a proposed by-law to be taken into consideration on the 15th of March, and naming the times and places for voting on it. On the 15th of March, the council passed another by-law, reciting *verbatim* that of the 11th of February, as a by-law adopted on that day, and that it had been voted upon and approved of, and enacting that the said by-law be finally passed, and be a by-law of the corporation. *Held*, that notwithstanding the signing and sealing, the by-law under these circumstances was not illegal as passed on the 11th of February, before the assent of the electors, but that it should be treated as finally passed on the 15th of March. It was stated in an affidavit filed in support of the motion to quash, that the true amount of the ratable property was not \$6,434,773, as stated in the by-law, but \$7,565,468. The clerk of the council, in answer, positively denied this, stating the true sum to be \$6,435,475. *Held*, that in the face of the clerk's affidavit the objection could not prevail, and that the difference between the sum in the by-law and that sworn to by him was unimportant. *Held*, also, that the by-law of the 15th of March did not impose a rate, but had the effect only of finally passing the previous by-law, and therefore did not require the assent of the electors. The introduction of the word "said" in the first by-law as recited in the second, which was not in the original, was treated as immaterial.

The by-law of the 11th of Febru-

ary, was passed at St. Catharines, Niagara being the county town, but a by-law had been passed in 1862, to authorize the meetings at St. Catharines. Secs. 130 and 131 of the Municipal Act direct the first meeting of the council to be on the fourth Tuesday in January at the county hall, and by sec. 136, subsequent meetings may be held elsewhere. *Held*, that the meeting was authorized. *Paffard and The Corporation of the County of Lincoln*, 16.

2. *County by-law—Extraneous objections—Refusal to quash for—Capitalizing property in towns at ten instead of six per cent—Consequent error in assessment rolls—By-law to authorize loan—Uncertainty in payment of debentures, &c.*—Where errors in computation only are shewn in a by-law, though extensive, the court will lean strongly to support it, especially where it has been acted upon, and where a previous ineffectual application to quash it has been made upon other objections. *Grierson v. The Municipality of Ontario*, 9 U. C. R. 623, affirmed, as to the extent to which the court is bound to give way to objections not apparent on the face of a by-law.

Where it appeared that the county council, in equalizing the assessments under section 70 of the "Assessment Act," had intentionally capitalized the personal property in towns and villages at ten per cent., instead of six, contrary to the express direction in section 32, the court refused to quash the by-law on motion, though they intimated that it might be held insufficient if relied upon for protection. It was also objected that by this course the amount of ratable property in towns and villages was made much greater than it should

have been, and so (in effect) that the amount shewn by the last revised assessment rolls, followed in the by-law, was wrong: but, *Held*, that on this application the court clearly could not go behind the rolls.

The by-law provided for raising \$22,500, and authorized the issue of debentures payable in from one to ten years, with interest half-yearly, but no greater sum than \$3200 to be payable in any one year; and it imposed a special rate of half-a-mill in the dollar, in addition to all other rates, until the debentures and interest should be paid in full. This was objected to as not shewing when or in what proportions the debt or debentures were to be payable, or how much each year; but, *Held*, good, for the rate not being unequal or insufficient, it was matter of calculation so to make the debentures payable that it would meet the principal and interest falling due in each year. *Secord and the Corporation of the County of Lincoln*, 142.

3. *By-law—Powers of town council with regard to sale of provisions, &c.—Licenses to butchers—Punishment imposed for breach—Whether it must be fixed in by-law or may be left to the magistrate.*—The corporation of a town by by-law enacted that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon, as therein provided, except all hides and skins from animals slaughtered by the licensed butchers of the corporation holding stalls in the market. *Held*, bad, as being

beyond the power of the corporation.

Also, that meat, fish, *poultry*, *eggs*, *cheese*, *grain*, hay, straw, cordwood, *shingles*, lumber, *flour*, *wool*, *meal*, *vegetables*, or *fruit*, except wild fruit, should not be exposed for sale within the municipality, except in the market, before twelve o'clock, noon. *Held*, bad as to the articles printed in italics, power being given as to the others only, by sec. 294, sub-sec. 10, of C. S. U. C. ch. 54.

Also, that before 10, A.M., during May, June, July, and August, and before 11 during the other months, no huckster, butcher, dealer, trader, runner, agent, or retailer, or any other person purchasing for export or to sell again, should buy, bargain for, engage or offer to buy any article of household consumption brought to the market, excepting pork, grain, flour, meal, or wool. *Held*, bad, except as to hucksters and runners, they only being included in sub-sec. 12.

Also, that all persons exercising the trade of a butcher within the town should be licensed each year, as provided, the fee for each license to be 5s. *Held*, clearly bad, under secs. 217 and 294, sub-sec. 31.

Also, that any person breaking any of these provisions should, upon conviction before the mayor or any other magistrate of the town, forfeit and pay a fine not exceeding \$50, nor less than \$1, and costs, and in default thereof, and of distress out of which to levy, should be committed, with or without hard labour, for not more than 21 days. *Qæere*, taking together sec. 243, sub-secs. 6, 7, 8, and secs. 206, 207, 360, 366, whether the statute authorizes a discretion as to the amount of fine and term of imprisonment to be thus given to the magistrate, or



whether it must not be fixed by the by-law. There being room for doubt as to this point, and reason to believe that many convictions might have taken place under similar provisions in other by-laws, the court refused to quash upon this objection. *In the matter of Charles Fennell and the Corporation of the Town of Guelph*, 238.

4. *By-law—Refusal to quash.*]—The court, under the circumstances of this case, refused to quash a by-law authorizing the erection of a town hall, the objection being that they had already by previous by-laws selected another site, and contracted to build it there. *Forester and the Corporation of the Township of Ross*, 588.

See ELECTIONS.—FENCE VIEWERS.—TEMPERANCE BY-LAWS,

### NEGLIGENCE.

See APPEAL, 1.—HARBOUR COMPANIES.—RAILWAYS AND RAILWAY COMPANIES, 1, 2, 6, 7.

### NEVER INDEBTED.

See RAILWAYS AND RAILWAY COMPANIES, 5.

### NEW ASSIGNMENT.

See LANDLORD AND TENANT.

### NEW TRIAL.

1. *Too small damages.*]—Action for excess of advances on defendant's wheat, consigned to plaintiffs for sale, above the proceeds. Verdict for plaintiffs, but for less than such excess. New trial granted for smallness of damages, costs to abide the event, *i.e.*, the event of plaintiffs recovering more than by

the verdict set aside—following *Jones v. McDowell*, 12 U. C. R. 214. *Craig et al v. Corcoran*, 406.

2. *Interpleader—Verdict taken in the absence of defendants' counsel—New trial—Affidavit of merits.*]—In an interpleader issue, the verdict having been taken in the absence of the defendants' counsel and attorney, the court granted a new trial, without requiring the usual affidavit disclosing fully the merits, holding that there was not the same necessity for such affidavit in an interpleader as in other cases. The attorney, who was also counsel in the case, not having satisfactorily excused his absence, the relief was granted only on payment of costs by him within a month. *Vidal v. The Bank of Upper Canada*, 430.

3. *Costs to be paid by the attorney.*]—In this case also, not an interpleader, a verdict was taken for the plaintiff in the absence of defendant's attorney, and a new trial was granted on payment of costs by the attorney within a month. *Dougall v. Wilson*, 433.

4. *New trial—Practice.*]—Where a plaintiff is disappointed in procuring testimony he should withdraw his record, or take a nonsuit, and a defendant in the like case should apply for a postponement. If instead of doing so he chooses to go to trial upon weak or insufficient evidence, he will not be relieved from an adverse verdict.

In applying for a new trial for the discovery of new evidence, the nature of such evidence must be stated. *The Corporation of Longueuil v. Cushman*, 602.

*Not granted for reception of improper evidence, where verdict warranted by other testimony.*]—See EJECTMENT, 5.

*Not granted, though evidence would well have supported a different finding.*—See FRAUDULENT REPRESENTATION.—HARBOUR COMPANIES. LIBEL AND SLANDER.

*Want of direction is no ground for, unless verdict against evidence.*—See INDEMNITY, 2.

*Granted for excessive damages.*—See RAILWAYS AND RAILWAY COMPANIES, 2.

See APPEAL, 1, 2, 4.

### NISI PRIUS.

See NONSUIT.—PRACTICE.

### NONSUIT.

*Right to move against—Practice.*—Action upon a promissory note. Plea, fraud and want of consideration. At the end of the charge, in which the judge had expressed an opinion that there was some evidence to support the plea, the plaintiff's counsel desired him to charge in a particular way, and upon his declining to do so took a nonsuit. *Held*, (affirming the judgment of the County Court,) that having thus elected to be nonsuited, the plaintiff could not afterwards move against it. *Taylor v. Rose et al.*, 446.

*Malicious arrest—Reasonable and probable cause shewn—Nonsuit ordered.*—See MALICIOUS ARREST, 1.

*May be ordered when issues of law and fact, and the former undetermined.*—See RAILWAYS AND RAILWAY COMPANIES, 1.

### NOTICE OF ACTION.

The notice of action stated a trespass on the 18th of October and on divers other days. The goods

were seized on that day, but returned, and again seized on the 18th of November and sold. *Held*, that the notice was sufficient. *Oliphant v. Leslie et al.*, 398.

### NOTICE TO EXAMINE.

A notice to attend, under C. S. U. C. ch. 32, sec. 15, served on the 25th of October for the 1st of November, is too late, not being "at least eight days." *Young v. O'Reilly*, 172.

### NOTICE.

*To produce—Time of service of.*—See ARBITRATION AND AWARD, 1.

*Of dishonor—Proof of waiver of.*—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Of title.*—See EJECTMENT, 1, 2.

*Required by sec. 25, of C. S. C., ch. 105, as to Court of Police Magistrate.*—See HABEAS CORPUS, 1.

*To quit.*—See HUSBAND AND WIFE, 1.—WILL, 1.

*Of arbitration under the Railway Act.*—See RAILWAYS AND RAILWAY COMPANIES, 5, 10.

### OATH OF QUALIFICATION.

*Of magistrates, before whom to be taken.*—See JUSTICES OF THE PEACE, 1.

### PAROL EVIDENCE.

*Of collateral stipulation added to written contract.*—See CONTRACT, 1.

*As to ownership of timber to be delivered under written agreement.*—See CONTRACT, 2.

## PARTNERSHIP.

*Rights of execution creditor of one partner against assignees of the firm.*]  
—See EXECUTIONS, 6.

## PARTITION.

1. *Power of the court to amend proceedings—C. S. U. C., ch. 86.*—A sale of lands having been ordered under the 17th section of the Partition Act, Consol. Stat. U. C., ch. 86, to be made by certain persons agreed upon by the parties, one of the persons named refused to act, and the petitioners then applied on this ground to rescind the order for sale, and for partition to be made by the real representative. *Held*, that the court could not interfere, not having any original or common law jurisdiction, and the case which had arisen not being provided for in the act. *Quære*, whether, as the person refusing had consented to the order for sale, and apparently accepted the duty, his conduct might not have been regarded as a contempt, or at least have subjected him to all the costs of the proceedings which his refusal had rendered nugatory. *Quære*, also, whether the order might not have been varied or rescinded by consent of all those who consented to its being made; or if one of those appointed to make the sale were to die or become incapable of acting, whether the court might not order the proceedings to be completed by those remaining. *In the matter of Partition between John Knowles et al., and Robert Post et al.*, 311.

2. *Omission to record—Confirmation.*—In 1855 the widow and children of one of two joint owners of land, petitioned for a partition under 2 W. IV., ch. 35, the other owner being respondent. In the

same year a partition was made under a writ directed to the sheriff, the return and plan were filed, and a rule to record and confirm it was moved for, but by some mistake this rule never issued, and there was no official entry of its having been either granted or refused. In 1860, the respondent died. The partition thus made had always been acquiesced in, the parties supposing that it had been confirmed. *Held*, that the court could not now, even by consent, examine and confirm such partition, for it would in effect be giving judgment against a party (the respondent) several years dead, and the proceeding would be void.

Attention called to the rule of court 112, requiring affidavits to be divided into paragraphs. *In the matter of Louisa Park et al., demandants for partition; and Samuel Hunt Park, respondent*, 459.

## PAYMENTS.

*On mortgage after default—Effect of—Ejectment.*—See MORTGAGE, 1.

## PERJURY.

See ELECTIONS.

## PLEADING.

*Trespass—Right of way—New Assignment.*—See LANDLORD AND TENANT.

See ACCORD AND SATISFACTION.—ARBITRATION AND AWARD, 2.—ASSIGNMENT.—COMMON COUNTS.—CONTRACT, 1.—DOWER.—ESCAPE.—RAILWAYS AND RAILWAY COMPANIES, 5, 9, 10.—ROAD COMPANIES.—SEDUCTION.—SURRENDER.



## POLICE MAGISTRATE.

See HABEAS CORPUS, 1.

## POSSESSION.

*Evidence of, to obtain title under Statute of Limitations.*]—See LIMITATIONS, STATUTE OF.

*Effect of possession of part only.*

## POUNDAGE.

See SHERIFF, 2, 3.

## POWER OF SALE.

See WILL, 1.

## PRACTICE.

*Practice at Nisi Prius—Verdict subject to the opinion of the court—Replevin—Delay in prosecuting suit.*]—A verdict cannot be taken subject to the opinion of the court without the consent of both parties. In this case the plaintiff sued on a replevin bond, given for a vessel, and the defendant pleaded that he had prosecuted the action without delay. The judge directed the jury that on the evidence there was delay, and to find for the plaintiff, and he asked them to find separately the value of the vessel and its earnings. A verdict in accordance with this direction was then taken, subject to the opinion of the court as to the true measure of damages. Defendant's counsel not having assented to this course, moved against the verdict, and declined to argue the case when set down on the paper by the plaintiff. *Held*, that the verdict must be set aside, and that no judgment could be given on the special case. *Bletcher v. Burn*, 124.

*Several defendants—Unauthorized appearance for one—Proceedings set aside.*]—See APPEARANCE.

*Several counts—General verdict Plaintiff not bound to elect.*]—See TRESPASS.

See AMENDMENT. — APPEAL. — BILLS OF EXCHANGE AND PROMISSORY NOTES. — COSTS. — EJECTMENT. — EXECUTIONS. — HABEAS CORPUS. — INDEMNITY, 1. — INQUISITION. — INTERPLEADER. — JUDGMENT. — MANDAMUS. — MORTGAGE, 1. — MUNICIPAL CORPORATIONS, 2, 4. — NON-SUIT. — NOTICE TO EXAMINE. — RAILWAYS AND RAILWAY COMPANIES, 5, 9, 10, 11. — REPLEVIN. — SHERIFF.

## PRACTICE COURT.

*Cannot grant Habeas Corpus.*]—See HABEAS CORPUS, 2.

## PRESUMPTION.

See HUSBAND AND WIFE, 2. — TAXES, 1.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## PUBLIC POLICY.

*Agreement contrary to.*] — See CHAMPERTY.

## QUALIFICATION.

*Of magistrates—Oath of, before whom to be taken.*]—See JUSTICES OF THE PEACE, 1.

## QUARTER SESSIONS.

See SHERIFF, 1.

## QUO WARRANTO.

*Quo warranto.*]—A quo warranto information was refused to try the right to the office of registrar, and

the applicant left to his action for the fees against the alleged intruder. *In re Hammond and McLay*, 56.

## RAILWAYS AND RAILWAY COMPANIES.

1. *Liability of sub-lessee.*—*Held*, (reversing the judgment of the county court,) that defendant, a sub-lessee of a railway company under "The Railway Act," C.S.C. ch. 66, was not liable for neglect to maintain fences, by which the plaintiff's cattle had been killed. A nonsuit may be ordered where there are issues of law and fact, and the former undetermined.]—*Bennett v. Covert*, 38.

2. *Accident—Plaintiff wrongfully in the baggage car—Contributory negligence—Excessive damages.*—The plaintiff, travelling in defendants' train on a passenger ticket, went into the express company's compartment of a car, of which the other two compartments were for the post office and the baggage. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's arm was broken. The compartment in which he was was not intended for passengers, but it appeared that they frequently went in there to smoke, and that the conductor had twice passed through it while the plaintiff was there without making any objection. No person in the passenger car was seriously injured. It was proved that notice that passengers were not allowed to ride upon the baggage car was usually put up on the inside of each door of the passenger cars, and on the door of the baggage car, but not distinctly shewn that it was there

on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out; and so that he was not to blame. *Held*, that assuming the plaintiff was aware of the notices, and nevertheless went into the baggage car, the defendants were not thereby excused under all circumstances; and that the jury were warranted here in finding that the plaintiff did not so contribute as to prevent him from recovering, the collision having resulted entirely from defendants' gross negligence. *Held*, also, that sec. 107, of "The Railway Act," did not apply.

The jury having given \$2000 damages, and the evidence as to the injury being very loose, no medical evidence having been called, the court granted a new trial on payment of costs. *Watson v. The Northern Railway Company of Canada*, 98.

3. *Railway Companies—Agreement within "The Railway Act," sec. 131—Consent of shareholders not obtained—Action on common counts.*—The Great Western and Grand Trunk Railway Companies, on the 27th of February, 1860, with a view to avoid competition, entered into an agreement under their respective corporate seals, providing for the same rates on through traffic to be charged by each, for the division of the profits from such traffic in specified proportions, and for the rendering of mutual monthly accounts, &c. To a declaration by the G. W. against the G. T. on the common counts, defendants pleaded this agreement, alleging that it had not been consented to by two-thirds of the shareholders of either company, as

required by the statute, and that the moneys sought to be recovered by the plaintiffs accrued to them only under such agreement. *Held*, on demurrer, a good defence, for that the agreement was clearly within "The Railway Act," C.S.C. ch. 66, sec. 131, (a consolidation of the 22 Vic. ch. 4, then in force,) which makes such consent a condition precedent to its validity.—*The Great Western Railway Company of Canada v. The Grand Trunk Railway Company of Canada*, 107.

4. C.S.C. ch. 66, sec. 11, sub-secs. 12, 13—*Costs of arbitration—Taxation of.*—Costs of an arbitration under "The Railway Act," sec. 11, can be taxed only by the County Court Judge; and the introduction in the bill of charges for business done in this court auxiliary to the arbitration, such as procuring an order for the attendance of witnesses, will not authorize a reference to the Master. *Quære*, whether such order can properly be granted in these arbitrations. *In re Henry McDermott*, 152.

5. *Arbitration under "The Railway Act," C.S.C. ch. 66—Lands injuriously affected—Withdrawal of arbitrator—Notice of desistment—Equitable plea of fraud—Never indebted—Plea, identity of cause of action in different counts.*—In an action on an award, under "The Railway Act," of compensation to the plaintiff for damages to his lands injuriously affected by the construction of the defendants' railway, the defendants pleaded that the award was made by two of the arbitrators after the other (the arbitrator appointed by them) had refused to act in and had withdrawn from the arbitration; to

which the plaintiff replied that the arbitrator withdrew at defendants' request, after all the evidence on either side had been heard, whereupon the other two proceeded to consider the case and award, having first duly notified him of their intention so to do. *Held*, on demurrer to the replication, that sec. 11, sub-sec. 15 of "The Railway Act," clearly did not apply to such a refusal and withdrawal, and that under sub-sec. 11, the two arbitrators had power to proceed as they did. *Held*, also, on demurrer to a plea of desistment under sub-sec. 16, and to the replication and rejoinder thereto, 1. That the power to desist extends to a case of lands injuriously affected as well as lands taken: 2. That with the notice of desistment a new notice should be given, and without it the old notice remains in force to uphold an award duly made under it.

Defendant also pleaded *on equitable grounds*, that the sum awarded was excessively and fraudulently exorbitant, and the award was made by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators making it. *Held*, on demurrer, a good defence.

The second count averred that the defendants, by their notice of arbitration, alleged that the plaintiff was entitled to no compensation; and that the arbitrators awarded him \$10,000; whereby, and by force of the statute, defendants became liable to pay him the costs of the arbitration, but did not pay. *Held*, on the authority of *Welland Railway Co. v. Blake*, 6 H. & N. 410, that never indebted was a good plea to this count.

The eleventh plea to the third count (a common count for money awarded), was that the award men-



tioned and the money claimed there and in the first count (a special count on the award), were the same. *Held*, no defence. *Widder v. The Buffalo and Lake Huron Railway Company*, 222.

6. *Neglect to fence—Right of lessees to sue—"Continuation of damage"*—*C.S.C. ch. 66, secs. 13. 19, 83.*]—The Grand Trunk Railway and the Weston Plank Road, crossed the plaintiff's land not far apart on parallel lines. The railway company, it was alleged, found it necessary to change the course of a stream over which the road company had built a bridge, to which the latter consented, on the railway company agreeing to make and maintain a bridge for them over the new channel. *Held*, that such agreement could not impose upon defendants any obligation to fence at this latter bridge, or make them liable to the plaintiffs for omitting to do so.

The plaintiffs also sued defendants for neglecting to fence in their own railway. *Held*, that though only lessees of the land, they were "proprietors" within the reasonable construction of "The Railway Act," and might recover for damage done to them. *Held*, also, that the fact of cattle from time to time getting upon the plaintiffs' land and destroying the crops, did not constitute a "continuation of damage," so as to entitle the plaintiffs to recover for more than six months' injury; for the continuation of the omission is not what is meant, but the damage resulting from it, and several unconnected acts of damage, each complete in itself, is not a continuation within the act. *Brown et al. v. The Grand Trunk Railway Company of Canada*, 350.

7. *Liability for loss of luggage.*]—Plaintiff, travelling on a first-class passenger ticket on defendants' railway, from Chatham to Toronto, had a travelling bag, which he took with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of the defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car to retain the place, and on his return from the refreshment room it was gone. *Held*, that defendants were liable for the loss. *Morrison, J.*, dissented, on the ground that, under the system of checking luggage adopted in this country, defendants' liability should be confined to articles checked. Per *Draper, C. J.*—That system should be considered as an additional precaution adopted by the defendants for their own security, not as affecting their liability. *Gamble v. The Great Western Railway Company*, 407.

8. *Railway ticket, "good for twenty days"*—*Right to stop at intermediate stations.*]—The plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked "good only for twenty days from date." He took defendants' afternoon accommodation train at the Suspension Bridge, which ran only as far as London, but he left it at St. Catharines, an intermediate station, and defendants refused to let him go on from thence by the night express. *Held*, that they were justified in so doing: that defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and if that train did not go the whole distance, to

be conveyed the residue in some other train, the whole journey to be completed within twenty days; but that it did not give a right to stop at any or every intermediate station. *Quære*, whether if he had gone on to London by the accommodation train, he would have been bound to take the next through train from thence. *Craig v. The Great Western Railway Company*, 504.

9. Ticket "good for this day only" — *Time tables, effect of—Pleading.*—The declaration stated that defendants contracted to carry the plaintiff as a passenger from G. (Gananoque) to T. (Toronto), but wrongfully expelled him from the cars. Defendants pleaded that on the 8th of December, 1864, they sold to defendant at G. a ticket from thence to T. "good for this day only:" that he thereupon took the train at G., which proceeded to T. by a continuous journey, but left it without defendants' consent at C. (Colborne), and on the 10th of December entered another of their trains going to T., by which they refused to carry him, which was the grievance complained of. To this the plaintiff replied, that before his purchase of the ticket on the 8th of December, defendants had publicly advertised, by their time table, that a passenger train would leave G. at 3.5 P.M., and arrive in Toronto at midnight: that he purchased his ticket before the arrival of the train at G. on that day, on its way to T., on the faith of such representation, but the train did not leave G. until 6 P.M., and defendants well knew that it would not, and it did not arrive at T. until the morning of the 9th: that on its arrival at C. the plaintiff, finding the train could not reach T. until the 9th, left it, and

defendants waived the terms of their ticket, and the plaintiff on the 10th claimed to go on by the morning train passing C. for T. on this ticket, but was prevented. *Held*, on demurrer, 1st. That the plea, without reference to the replication, was a good defence, for the ticket was a contract by defendants to convey the plaintiff from G. to T. in one *continuous* journey, to commence on the date of issuing it. 2. That the replication was bad, for even if the time table could be construed as incorporating a condition as to time into the contract, yet as the contract was partially executed for the plaintiff's benefit by his conveyance to C., the breach could only entitle him to compensation in damages. 3. That the time table could not be treated as part of the contract, but amounted to a representation only; and in that view the plaintiff should have averred that he bought his ticket on the faith of such representation before the time specified for the train to leave G., not merely before the arrival of the train there, for if after the time specified, he knew as well as defendants that the time table had been departed from. *Quære*, whether the plaintiff by leaving the train at C., and thus making it impossible for defendants to perform the substantial part of their contract, by conveying him in one continuous journey to T., had not forfeited all right under it. *Briggs v. The Grand Trunk Railway Company*, 510.

10. *Arbitration under "The Railway Act," C.S.C. ch. 66—Lands injuriously affected—Action on the award—Plea of fraud—Admissibility of evidence not before the arbitrators—Form of notice appointing arbitrators—Improper conduct of de-*

*fendants with jury—Waiver, &c. &c.]*

—The plaintiff claimed compensation from defendants for injuriously affecting his land in the town of Goderich by the construction of their railway, and defendants having denied that the land was so affected within the meaning of the statute, were compelled by mandamus to go to arbitration. The plaintiff's land was on a navigable river, extending to high water mark thereof; and the injury complained of was, that defendants had built their railway along the river on piles in front of his land, and cut off his access to the water. The defendants appointed one M., their own engineer, as their arbitrator, the plaintiff appointed one McD., and these two, after some correspondence, not agreeing upon the third, the plaintiff applied to the County Court Judge, who appointed one P. Both parties appeared before the three arbitrators, and after the plaintiff had concluded his evidence, defendants' counsel gave what was intended as a notice of desistment under the act. He and the defendants' arbitrator then declined to call witnesses, and withdrew from the arbitration, being first notified that the other two arbitrators would go on and award, which they did without separating. The notice of desistment was afterwards held by the court to be ineffectual.

To an action brought upon the award, defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was obtained by the fraud, covin, and misrepresentation of the plaintiff and of the arbitrators making it; and to support such plea they called several witnesses to prove that the sum was grossly excessive. None of these

witnesses however had been brought forward at the arbitration, although defendants could have called them then as well as at the trial; the award was clearly sustained by the only evidence before the arbitrators; no attempt was made to impeach the credit of any of the witnesses who gave it; no misconduct was proved on the part either of the plaintiff or of the arbitrators; and the arbitrators, being sworn, denied any improper motive. *Held*, that under these circumstances the evidence as to value of witnesses not before the arbitrators was inadmissible in support of the plea. *Quære*, whether anything short of actual fraud could support such a plea. *See* *Daly v. These Defendants*, 16 U.C.R. 245.

The jury were directed that if the plaintiff urged to the arbitrators that he had an exclusive right to the water when he had not, it was evidence to sustain the plea of fraud. *Held*, that no argument used by the plaintiff to enhance his claim or place his case in the best light, could be a fraud.

The jury were also told that the plaintiff's right of access to the water remained as before, subject to defendants' right to use their railway. *Held*, that this was a direction calculated to mislead, for the convenience of access was materially interfered with, and the jury might confound the right with the power of exercising it.

The day before the trial defendants applied to the judge at *Nisi Prius* to order a view of the land in question, which was refused, as it lay in another county. Several of the special jury summoned to try the cause were then, on the same day, taken by defendants in a special train to view the land. Notice that they would be so taken



had been given by defendants, who offered to take any one representing the plaintiff, but the plaintiff declined to take any part in the proceeding. The jury were provided by defendants with refreshments, and accompanied by M., the defendants' arbitrator, who however said that he had no discussion of the case with them. The plaintiff's counsel, before the trial began, called this fact to the attention of the judge, and protested, reserving his right to object. *Held*, that the proceeding was improper and irregular, but that the plaintiff having submitted his case to the jury with full knowledge of it, was precluded from objecting.

At the trial defendants moved for a non-suit, objecting,

1. That the defendants had a right to build their crib-work in the river, and that it was improperly considered as part of the damage. *Held*, that this objection had been disposed of by the judgment awarding a mandamus.

2. That evidence was improperly received of the cost of constructing crib-work to make the plaintiff's property available, he having no right to make it. *Held*, clearly no ground of non-suit.

3. That defendants' notice appointing their arbitrator was not accompanied by a surveyor's certificate, and it denied that the plaintiff was entitled to any compensation. *Held*, that as no land was taken, and defendants denied the plaintiff's right to anything, the certificate was unnecessary. *Held*, also, that such notice need not be under the defendants' corporate seal.

4. The notice described the plaintiff's claim as being "in respect of the alleged damages claimed

by you for the construction of their railway along the margin of the river Maitland, northerly of your land in the town of Goderich, as the same is now made and built." *Held*, that this sufficiently described the subject matter of the dispute, and the property alleged to be injuriously affected. *Held*, also, that objections urged by a party to his own notice should be examined most strictly.

5. That there was no sufficient evidence of disagreement between the two arbitrators to warrant the appointment of a third by the county judge. *Held*, that this objection had been waived by defendants attending before the three arbitrators.

6. *Held*, also, that there was no variance between the award, set out in the case, and the submission.

7. That the award was made without the day's notice to defendants' arbitrator required by the act. *Held*, no objection, for it was made at the same meeting from which he withdrew.

8. That the appointment by the judge should have been endorsed on the company's notice. *Held*, clearly no objection, the statute not requiring it.

9. *Held*, also, no objection that the arbitrators awarded costs, for if unauthorized it was easily separable from the rest of the award.

Remarks by the Chief Justice on the appointment by defendants of their own engineer as arbitrator, and upon the duty of an arbitrator. *Wilder v. The Buffalo and Lake Huron Railway Company*, 520.

11. *Common carriers — Special conditions.*]—Action against defendants as common carriers for delay in carrying goods. *Plea*, setting

up special conditions, on which the goods were received, exempting defendants from liability, *held* good on demurrer. Remarks as to the necessity and justice of legislative redress in such cases. *Bates v. The Great Western Railway Company*, 544.

*Warehouse receipts given by R. W. Co—Mistake in quantity—Liability for to the parties.*]—See FRAUDULENT REPRESENTATIONS.

See TORONTO STREET RAILWAY COMPANY.

## RECEIPTS.

*Fraudulent receipts — Error in quantity—Liability for to third parties.*]—See FRAUDULENT REPRESENTATION.

## RECOGNIZANCE.

*Relief under C. S. U. C., ch. 117, sec. 11.*]—Defendant having entered into a recognizance to appear at a certain assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him, of a breach of the Foreign Enlistment Act, was not intended to be prosecuted. He was however called, and his recognizance estreated. The court, under the circumstances, relieved him and his sureties, under C. S. U. C., ch. 117, sec. 11, on payment of costs, and on his entering into a new recognizance to appear at the following assizes. *The Queen v. McLeod*, 458.

## REGISTRAR.

See MANDAMUS.—QUO WARRANTO.

## REGISTRY.

1. 9 Vic., ch. 34—*Addition of witness omitted.*]—The 9 Vic., ch. 34, requires that every memorial shall contain (among other things) the names and additions of all the witnesses to the deed, and provides that every deed shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee, “unless such memorial be registered as by this act is directed,” before the registering of the subsequent deed. *Held*, that registry in accordance with the act was imperative; and a deed registered upon a memorial in which the addition of the witness to the deed was omitted, was therefore held fraudulent and void as against a subsequent mortgagee. *Robson v. Waddell et al.*, 574.

2. *Voluntary conveyance—27 Eliz. ch. 4—Registration.*]—O., requiring money, mortgaged land to B., in 1854, for £50, to enable B. to obtain it for him, which mortgage was registered in the same year. B. having done nothing, O., in 1856, got him to assign the mortgage to S., who paid B. £25, but neglected to register the assignment until 1864. In the meantime O. conveyed, for value, to M., to whom B., for a nominal consideration, conveyed his interest. *Held*, 1. That the mortgage to B., being voluntary, was void under the 27 Eliz. ch. 4, as against the conveyance for value to M., and that the fact of its being first registered could not affect its validity in this respect. 2. That the assignment by B. to S. was fraudulent and void under the Registry Law as against M., a subsequent purchaser for value who had first registered. *Miller v. McGill*, 597.

See EJECTMENT, 4.

## RELEASE.

*Of dower—Proof of.*—See EVIDENCE, 1.

## REPLEVIN.

1. *Delay.*—*Semble*, that the inability of the plaintiff's attorney in replevin to communicate with his client, not knowing where he was, affords no excuse for allowing two assizes to elapse; for it is the plaintiff's delay, not that of his attorney, which is a breach of the bond. *Bletcher v. Burn*, 124.

2. *Action on replevin bond—Excuse for delay in the replevin suit—Measure of damages*—23 Vic. ch. 45—*Effect of.*—Defendant replevied a schooner in September, 1862. Issue in fact was joined in the replevin suit in March, 1863, and issues in law also raised were disposed of in September, 1863, but nothing more was done. In February, 1864, an action was brought on the replevin bond by the plaintiff, as assignee of the sheriff, to which defendant pleaded only that he had prosecuted the replevin suit without delay. As an excuse for not going to trial at the assizes which began on the 12th of October, 1863, defendant proved that he sailed in the schooner, as master, from Port Colborne, about the 1st of October, for Chicago, which he was prevented from reaching until the 25th, the usual time required for the voyage being about ten days; and that his attorneys, not knowing where he was, and getting no answer to their letters, countermanded the notice of trial. *Held*, no excuse, for it could not be presumed that defendant's presence was necessary for the trial, nor that

his attorneys were not properly instructed before he left, or were in ignorance of his going; and if they were, *quære*, whether it would have made any difference, for issue had been joined since March, and there had been ample time, therefore, to give all necessary information. The reason offered for not proceeding at the winter assizes in January, 1864, was, that on the 7th of November, 1863, defendant filed a bill in Chancery against the plaintiff and others, relating to the title to this vessel, and praying, among other things, to restrain proceedings on the replevin bond. *Held*, also, no excuse. *Held*, also, that the plaintiff was entitled to a verdict for the penalty of the bond, \$10,000. *Quære*, as to the effect of 23 Vic. ch. 45, sec. 5, adding a new condition to the replevin bond. *Semble*, that it gives no right to damages not before recoverable; and it does not bring such bond within the statute of Wm. III. *Bletcher v. Burn*, 259.

*For goods sold for taxes.*—See TAXES, 2.

## RIGHT OF WAY.

See LANDLORD AND TENANT.

## ROAD COMPANIES.

*Road company—Unauthorized agreement*—C. S. U. C. ch. 49, secs. 13, 32—*Pleading.*—Plaintiff declared on an agreement with a plank road company, by which he contracted to build four miles of road for them for a certain sum, to be paid to him by the tolls to be collected on said four miles, and on three other miles of road belonging to them; and defendants agreed that he should receive all the tolls



on these seven miles until payment of the sum named, with interest. The breach alleged was that they had received the tolls themselves, and had not paid him. *Semble*, that whether the four miles which the plaintiff contracted to make was part of the road which the company was originally formed to construct, or an alteration and extension of it, the agreement would be invalid, for it would appear from it that defendants were providing to construct and pay for the road by pledging the tolls upon it when constructed, and the statute C.S.U. C. ch. 49, secs. 13, 32, requires sufficient funds to be raised before beginning to construct:— This would not be borrowing “by mortgage of the road and tolls to be collected thereon,” within sec. 32, though it might produce the same result.

Defendants pleaded, on equitable grounds, that they were a joint stock company under the statute; that the agreement was made without the knowledge or consent of the directors, and if with the consent of a majority that it was done fraudulently, and without notice to the other directors to be present when it was considered, and without the corporate seal, or if with it without authority for affixing the same, and without any by-law.

The plea was not proved, and the plaintiff had a verdict, but there were common counts also, to which it could form no defence, and in accordance with an agreement at *Nisi Prius*, both parties were allowed to amend, and a new trial was granted in order to ascertain the facts fully, costs to be costs in the cause. *Semble*, that the plea should not have been put in issue, being altogether defective and uncertain. *Thornton v. The Sand-*

*wich Street Plank Road Company*, 335.

### SALE OF GOODS.

*Sale of lumber to be manufactured—Accidental fire—Proof of acceptance.*—Plaintiff on the 7th of March, 1864, agreed to sell to defendant all the lumber which the new saw-logs at the plaintiff's mill would produce, to be cut in the manner specified, and delivered during the year at the railway station, at a named price per thousand feet, defendant to accept the same, and pay therefor as delivered. About the 21st of June defendant inspected and measured 21,072 feet at the mill. On the 29th he went with the plaintiff to the station, and the plaintiff told him there was then 75,000 feet there. On the 21st of July this was accidentally burned. By the 17th of August an additional quantity had been delivered, making in all 119,000 feet, of which defendant was notified by the 20th. The plaintiff having sued defendant on special counts for not accepting, and for goods sold and delivered, the jury were told that an acceptance might be proved either expressly or by permitting a reasonable time to elapse without objection after notice of delivery; and they found for the value of the whole quantity on the last count. *Held*, that the verdict was right: that the plaintiff could sue on the common count though all the lumber contracted for had not been manufactured, for defendant was bound to pay “as delivered,” *i.e.*, after he had received proper notice of delivery and had not objected: that the seller had done all that was requisite, either on his own behalf or the buyer's, by sawing, measuring, delivering, and giving notice; and

was therefore entitled to recover. Defendant contended that the time for accepting the 75,000 feet had been extended by mutual agreement to a day after the fire, but the evidence on this point was contradictory. *Cox v. Jones*, 81.

*Sale under execution.*—See EXECUTIONS, 2, 3, 4.

*Sale for taxes.*—See TAXES, 1, 3.

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## SALE OF LAND.

See LAND—REGISTRY, 2.

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## SATISFACTION.

See ACCORD AND SATISFACTION.

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## SCIENTER.

*Evidence of.*—See TRESPASS.

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## SEDUCTION.

1. *C. S. U. C. ch. 77.*—Declaration by husband and wife for the seduction of the wife's daughter by a former husband, while living with the plaintiffs, whereby she became pregnant (not alleging the birth of a child), and they lost her services. *Held*, bad, following *Smith et ux. v. Crooker*, 23 U. C. R. 84. *Quære*, whether sec. 1 of the Seduction Act, C. S. U. C. ch. 77, applies, except where the female seduced "was at the time of her seduction serving or residing with another person." *Semble*, that sec. 3, postponing the right of the master for six months to that of the father or mother, refers only to the new right of action given to the latter by sec. 1; and if so, *quære*, whether the ground upon which the plaintiff's

verdict in *McIntosh v. Tyhurst*, 23 U. C. R. 565, was set aside, can be maintained. *Green and Wife v. Wright*, 245.

2. *C. S. U. C. ch. 77—Construction of.*—A widow, having an unmarried daughter, married the plaintiff, and took the daughter to her new home. While living there and performing acts of service she was seduced. *Held*, that the stepfather might maintain an action as at common law, though six months had not expired from the birth of the child, for it could not be said that the daughter was at the time of her seduction not living with her mother, but with "another person," within sec. 1 of the Seduction Act, and sec. 3 therefore did not apply. Remarks as to the object and proper construction of the statute. See *McIntosh v. Tyhurst*, 23 U. C. R. 565, which is in effect overruled by this decision; and *Green v. Wright*, ante, page 245, *McIntosh v. Tyhurst*, 443.

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## SHERIFF.

1. *Jury Act, C. S. U. C. ch. 31—Sheriff's fees — Mandamus — Demand and refusal—Quarter Sessions—Order on Treasurer, how to be drawn.*—Where the sheriff travels to summon grand and petit jurors at the same time, and serves both during the same journey, he is not entitled (under C. S. U. C. ch. 31.) to charge separate mileage on each set of summonses, but only for the number of times actually travelled in order to serve all the jurors. He is entitled, under sec. 161, sub-sec. 3, besides his mileage, to \$12 for summoning the 48 petit jurors for the County Court, and the same sum for the Quarter Sessions, though the same jurors are sum-

moned for both courts, and served at the same time with both summonses. On application for a mandamus to the chairman of the Quarter Sessions to sign an order on the treasurer for payment of the sheriff's account which had been audited and passed, the chairman stated, in his affidavit filed on shewing cause, that he declined to mark the account as audited and passed, and said that he would not sign a check therefor. *Held*, that this removed all objection to the proof of a demand and refusal. *Semble*, that such a mandamus could not properly be granted, for—1. It is not essential that an order of the Quarter Sessions should be signed by the chairman; and—2. He has no right to draw orders on the treasurer except when presiding in court, and then it is an order of the court, not of the presiding justice.

The introduction in the affidavits of both sheriff and chairman of remarks impugning each other's motives and conduct, strongly disapproved of. *In the matter of Davidson, Sheriff of, and Miller, Chairman of the Quarter Sessions for, the County of Waterloo*, 66.

2. *Action against sheriff for not paying over moneys levied—Exemption Acts*, 23 Vic. ch. 25, 24 Vic. ch. 27—*Poundage—Costs of rule to return—Interest—Sheriff's charges.*—In an action against the sheriff and his sureties for not paying over moneys levied under a *fi. fa.*, it appeared that certain goods of one H. had been seized by the sheriff at the plaintiff's suit, and claimed by the debtor's brother, under a sale which the plaintiffs alleged to be fraudulent. The debtor also claimed exemption for \$60 worth, under the 23 Vic. ch. 25, and these latter goods the sheriff

sold under a subsequent execution, the debt for which that judgment was recovered having been contracted before the 19th of May, 1860, as appeared by an exemplification of the judgment. The plaintiffs alleged that these goods were not subject to that writ, there being no certificate endorsed upon it under 24 Vic., ch. 27, sec. 2. *Held*, that the plaintiffs could have no claim on account of such goods or their proceeds, for they were exempt from their writ under 23 Vic. ch. 25; and even if not subject to the other execution, the sheriff was responsible to the execution debtor, not to the plaintiffs, for the proceeds. *Semble*, however, that the want of the certificate was immaterial, as the statute does not make it the only mode of proving when the debt was contracted, and here that was shewn by the exemplification.

*Held*, 1. That the sheriff is entitled to poundage only on the sum paid over by him, not on what he retains for himself.

2. That the costs of a rule to return the writ could not be recovered in this action, and that the expense of a messenger sent to the sheriff to demand the money which he had returned as on hand could not be allowed.

3. The court being left to decide as a jury, allowed interest to the plaintiffs on money levied and improperly withheld by the sheriff.

4. And they expressed great surprise at finding that on a sale of goods, producing in gross \$846, the expenses amounted to \$106, believing that such a charge would not be found justified by the tariff and the proper practice under it.

The bill of disbursements charged by the sheriff was referred to the



Master, to tax what in his discretion was necessarily incurred in the care and removal of the goods. *Michie et al. v. Reynolds, Sheriff, et al.*, 303.

3. *Poundage.*—The sheriff cannot maintain an action against the execution debtor for his poundage. *Thomas, Sheriff, &c., v. The Great Western Railway Company*, 326.

4. *Sheriff's fees—C.L.P.A. sec. 271—Construction of.*—A judge's order, under C.L.P.A. sec. 271, fixing the allowance to be made to the sheriff where there has been a seizure under execution but no money levied, is final. In this case the sheriff rendered his bill, and the plaintiff obtained a summons to reduce it or determine what would be a reasonable charge. *Semble*, that the sheriff should have applied, in order to authorize him to make charges not sanctioned by the tariff. *Semble*, also, the judge's duty is not to tax the sheriff's account, but to fix a rate of charges for services rendered, leaving to the master to determine the amount in case of dispute. *Gwynne v. The Grand Trunk Railway Company*, 482.

See EXECUTIONS.—INTERPLEADER.

### SHERIFF'S FEES.

See SHERIFF, 1, 2, 3.

### SHERIFF'S SALE.

*Title claimed under—Right of defendant to impeach plaintiff's title, and require proof of judgment.*—See JUDGMENT.

*Excessive charges upon.*—See SHERIFF, 2.

See EXECUTIONS.

### SPECIAL CASE.

See PRACTICE.

### STATUTES (CONSTRUCTION OF).

14 Geo. III. ch. 48 (Imperial Act).—See Insurance, 2.

13 and 14 Vic. ch. 67.—See Taxes, 1, 2.

16 Vic. ch. 182.—See Taxes, 2.

C.S.U.C. ch. 10, sec. 9.—See *Habeas Corpus*, 2.

C.S.U.C. ch. 13.—See Appeal, 3, 5.

C.S.U.C. ch. 15, sec. 68.—See Appeal, 6.

C.S.U.C. ch. 19, sec. 195.—See Division Court.

C.S.U.C. ch. 22 (Common Law Procedure Act), sec. 222.—See Amendment.

C.S.U.C. ch. 22 (Common Law Procedure Act), sec. 267.—See Executions, 3.

C.S.U.C. ch. 22 (Common Law Procedure Act), sec. 271.—See Sheriff, 4.

C.S.U.C. ch. 27.—See Ejectment.

C.S.U.C. ch. 31.—See Sheriff, 1.

C.S.U.C. ch. 32, sec. 15.—See Notice to Examine.

C.S.U.C. ch. 49.—See Road Companies.

C.S.U.C. ch. 54.—See Fence Viewers—Municipal Corporations.

C.S.U.C. ch. 73.—See Husband and Wife, 2.

C.S.U.C. ch. 77.—See Seduction.

C.S.U.C. ch. 85.—See Husband and Wife, 1.

C.S.U.C. ch. 86.—See Partition.

C.S.U.C. ch. 105.—See *Habeas Corpus*, 1.

C.S.U.C. ch. 126.—See Justices of the Peace, 2, 3.

C.S.C. ch. 66.—See Railways and Railway Companies.

C.S.C. ch. 79, sec. 4.—See Subpoena.

C.S.C. ch. 100, sec. 3.—See Justices of the Peace, 1.

C.S.C. ch. 103, sec. 59.—See Justices of the Peace, 3.

C.S.C. ch. 103, sec. 67.—See Justices of the Peace, 2.

23 Vic. ch. 45.—See Replevin, 2.

23 Vic. ch. 25, and 24 Vic. ch. 27.—See Sheriff, 2.

24 Vic. ch. 83.—See Toronto Street Railway Company.

27 Vic. ch. 14.—See Appeal, 6.

27–28 Vic. ch. 18.—See Temperance By-laws.

27–28 Vic. ch. 100.—See Canada Co.

## STAYING PROCEEDINGS.

*Allowance of bond on appeal—How far a stay*—See APPEAL, 3, 5.

## STET PROCESSUS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## STREAM.

*Description of land commencing at the intersection of a road by a stream—Effect of.*—See DESCRIPTION OF LAND.

## SUBPŒNA.

1. C. S. C. ch. 79, sec. 4—C. S. U. C. ch. 32, sec. 15—*Construction of.*—*Quære*, whether sec. 4 of Consol. Stats. C. ch. 79, authorizing the issue of a subpœna to Lower Canada, applies to a party to the suit. *Semble*, not, as Consol. Stat. U. C. ch. 32, sec. 16, apparently contemplates a commission in such case. *Young v. O'Reilly*, 172.

## SUMMONS.

*Interpleader summons in Division Court—Proof of enlargement of.*—See DIVISION COURT.

## SURRENDER.

*By operation of law—Evidence of—Pleading.*—To an avowry for distress for rent the plaintiff pleaded that before the distress he surrendered his interest in the term to defendant, and the said tenancy was put an end to and ceased by the defendant entering on the said premises by act and operation of law. A lease for five years was proved at \$150 a year, under which the plain-

tiff entered, and it appeared that before the end of the second year, and before the distress, defendant, having offered the plaintiff \$50 to allow him to take possession, went to live in the house. Defendant afterwards told a witness that he had let the place again to the plaintiff on shares, he, defendant, living on it as owner. He afterwards got the lease from this same witness, with whom it had been deposited by both parties, saying that it was of no use. The plaintiff also lived in the house, but the agreement was that defendant, and not he, should have the right of possession. These arrangements were verbal. *Held*, that the facts proved clearly shewed a surrender by operation of law, and the plea, though inartificially framed, was in substance an averment that the term was thus surrendered before the distress; and that the plaintiff was entitled to recover. *Coffin v. Darnard et al.*, 267.

## TAXATION OF COSTS.

See RAILWAYS AND RAILWAY COMPANIES, 4.

## TAXES.

1. *Sale under 13 & 14 Vic. ch. 67—Insufficient description of land sold—Other objections.*—Upon objections taken to defendant's title, depending upon a sale for taxes under the 13 & 14 Vic. ch. 67:—

1. The act, sec. 53, directs the sheriff to sell such part as he shall consider it most for the advantage of the owner to sell first, and sec. 57 enacts that the deed "shall describe the land by its situation, boundaries and quantity." The description in this deed was, "eighty-nine acres of the south part of the east half of lot number twenty-five, in the second

concession of the township of Charlottenburg." *Held*, insufficient, as containing no statement of boundaries. 2. *Held*, that the fact of there having been no distress upon the land could make no difference. 3. The land was called in the collector's return the E.  $\frac{1}{2}$  25, 2nd con. Charlottenburg, the word "front" before "2nd," being struck through with a pen, while in the warrant that word was written, and in the sheriff's deed it was omitted. *Held*, immaterial, for that the identity of the land sold with that on which the tax was to be collected was sufficiently proved. 4. *Held*, no objection that the collector was bound by the act to make his return on the 14th of December, but delayed till the 8th of April following, for that it was a matter between him and the municipal council, which could not prejudice the title; and as they received the return without objection, it might be assumed that they had appointed the 8th of April to make it on. 5. The east half appeared to have been assessed separately, and it was admitted that the whole of lot 25 had been granted together. *Held*, in the absence of any explanation, that it should be presumed the tax on the west half had been paid, and that it had therefore been properly assessed separately. 6. The want of proof of a certificate from the sheriff, under sec. 54, was held unimportant. *McDonnell et al. v. McDonald*, 74.

2. *Proof of demand—Entry made by deceased collector.*—In replevin for goods sold for taxes, the plaintiff having succeeded for want of evidence of any demand by the collector, defendants moved for a new trial on affidavits shewing the discovery, since the trial, in the collector's blank receipt book, opposite to the receipt intended to have

been given for these taxes, of a minute made by the collector, "Wrote January 21st, 1864." The death of the collector was shewn, but not when he died, nor when the entry was made, nor that it was in the usual course of business to make such an entry. *Held*, that it would be insufficient to establish a demand, and a new trial was therefore refused. *Barton v. The Corporation of the Town of Dundas and W. F. Parsons*, 273.

3. 13 & 14 Vic. ch. 67—*Sale under—Power of sheriff to convey after repeal of by 16 Vic. ch. 182—Casus omissus.*—The 13 & 14 Vic. ch. 67, allows three years for redemption of land sold for taxes, before the sheriff can convey. It was repealed by 16 Vic. ch. 182, which came into force on the 1st of January, 1854, except in so far as it might affect "any rates or taxes of the present year," 1853, "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this act." The plaintiff purchased, under 13 & 14 Vic., in 1852; so that he was not entitled to a conveyance until the act had been repealed. *Held*, that as the exemption in the repealing clause gave no power to complete inchoate proceedings, the sheriff could not convey, although such a result was clearly not intended. *McDonald v. McDonnell et al.*, 424.

## TEMPERANCE BY-LAWS.

1. *Temperance Act of 1864—By-law under—Motion to quash.*—A by-law passed under 27 & 28 Vic. ch. 18, after having been submitted to the electors, enacted, "1. That the sale of intoxicating liquors and



the issue of licenses therefor is by this by-law prohibited within the County of Halton, under authority and for enforcement of 'The Temperance Act of 1864.' 2. That by-law No. 41 is hereby repealed." By-law 41 recited a petition from the rate-payers for it, and enacted that from its passing and approval by the electors, "the sale of intoxicating liquors, and the issue of licenses therefor is hereby prohibited." The court refused to quash this by-law on account of the second clause, for though its insertion was contrary to the letter of section 2 of the statute, it could have no effect, the prohibition in both by-laws being identical, and the approval of the electors having been obtained, and the defect therefore was "a defect of procedure or form," within sec. 37. *In re Boon and The Corporation of the County of Halton*, 361.

2. *Temperance Act*, 27-28 Vic. ch. 18—*Application to quash by-law—Insufficient notice.*—Under the 27-28 Vic. ch. 18, a requisition for the by-law must be published by the clerk for four consecutive weeks in some newspaper published weekly or oftener within the municipality, with a notice that on some day within the week next after such four weeks, a poll would be taken. The notice in this case, first published on Thursday, 12th of January, appointed Tuesday, 7th of February, for the poll. *Held*, too soon, and the by-law was quashed. It was contended that the four weeks must be computed from the first day of the week in which the first publication takes place, not from the day of such publication, but *held*, clearly not. *Quere*, whether on motion to quash such by-laws, it could have been intended

that the court, in term, should enter into a scrutiny of votes. *In the matter of Coe and the Corporation of the Township of Pickering*, 439.

## TENANCY IN COMMON.

*Created by deed.*—See EJECTMENT, 4.

*By will.*—See WILL, 2.

## TIMBER.

*Custom in marking—Proof of.*—See CONTRACT, 2.

*Written contract to deliver—Parol evidence of ownership.*—See CONTRACT, 2.

## TIME TABLES.

*Published by Railway Cos.—Effect of as a contract by them.*—See RAILWAYS AND RAILWAY COS., 9.

## TITLE.

*Of purchaser of lands at sheriff's sale, not affected by errors in advertisement.*—See EXECUTION, 3.

*Of purchaser from debtor, not affected by subsequent judgment or execution.*—See LAND.

See CONTRACT, 3.—EJECTMENT.

See WILL.

## TOLLS.

See ROAD COMPANIES.

## TORONTO STREET R.W. Co.

24 Vic. ch. 83, sec. 6—*Indictment under.*—Defendants' act of incorporation required that "the rails of their railway shall be laid flush with the streets and highways, and the railway track shall conform to the

grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways." *Held*, that an omission to lay the rails flush with the street would be indictable, without shewing that any unnecessary impediment was offered to the traffic. *Regina v. The Toronto Street Railway Company*, 454.

### TRESPASS.

*Injury by domestic animals—Trespass maintainable—Evidence of Scientist—Right of bailee or owner to recover—General verdict on two counts—Plaintiff not bound to elect.*]—*Held*,—affirming the judgment of the County Court, and *Blacklock v. Millikan*, 3 C. P. 34,—that trespass is maintainable against the owner of a bull which has broken into the plaintiff's close, and there killed his mare, defendant not being present or aware of the act. *Held*, also, that upon a count in case, alleging defendant's knowledge of the bull's vicious propensity, the fact that he had once admitted that his bull had done the injury, and offered the plaintiff \$10, was properly submitted to the jury as evidence of such knowledge, with a caution, however, as to its weight, as in *Thomas v. Morgan*, 2 Cr. M. & R. 496.

The mare was in the plaintiff's field at the time of the accident, and had been put there by his father, who had given it to the plaintiff. *Semble*, that the right of property was immaterial, as the plaintiff, even if only a bailee, could recover its value against a wrongdoer.

The plaintiff having declared in one count for entering his close, and there destroying his mare, and in the other in case for keeping the

bull, knowing his vice, &c., and having recovered a general verdict, *Held*, that he was not bound to elect upon which count to take his verdict. *Haacke v. Adamson*, 14 C. P. 201, remarked upon. *Mason v. Morgan*, 328.

*Proof of, to connect defendant with seizure by bailiff.*]—See DIVISION COURT.

*Right of husband and wife to bring trespass for injury to wife's land.*]—See HUSBAND AND WIFE, 3.

*Right of wife to sell alone.*]—See HUSBAND AND WIFE, 2.

*When maintainable against J.P.*]—See JUSTICES OF THE PEACE, 2, 3.

*Right of way—New assignment.*]—See LANDLORD AND TENANT.

*The proper form of action against magistrate acting out of his county is trespass, not case.*]—See MALICIOUS ARREST, 2.

*Notice of action in.*]—See NOTICE OF ACTION.

### USURY.

*Variances in proof of plea.*]—See AMENDMENT.

### VERDICT.

*Cannot be taken subject to the opinion of the court without consent.*]—See PRACTICE.

*Several counts—General verdict—Plaintiff not bound to elect.*]—See TRESPASS.

### VOLUNTARY DEED.

See JUDGMENT, 1.—REGISTRY, 2.

### WAIVER.

*Of notice of dishonor of bill—Evidence of.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Of improper conduct with jury.*—  
See RAILWAYS AND RAILWAY COMPANIES, 10.

*Of disagreement of two arbitrators upon appointment of third.*]—*Id.*

*Of proof of demand and refusal, on application for mandamus.*]—  
See SHERIFF, 1.

*Of false return of nulla bona, by consenting to it.*]—See EXECUTIONS.

## WAREHOUSE RECEIPTS.

*Given by railway company—Error in quantity—Liability to third parties.*]—See FRAUDULENT REPRESENTATION.

## WARRANT.

*Demand of perusal and copy of, from Division Court bailiff.*]—See DIVISION COURT.

## WATER.

See RAILWAYS AND RAILWAY COMPANIES, 10.

## WATER COURSE.

See DESCRIPTION OF LAND.

## WIFE.

See HUSBAND AND WIFE.

## WILL.

1. *Will—Construction—Power of sale.*]—*B.* by his will bequeathed to his wife, *A.*, the land in question, “to be at her disposal, if agreeable to the executors,” of whom she was not one, “so long as she remains a widow,” adding, “I wish and desire the aforementioned farm to be sold for the discharge of my lawful debts, and the residue accruing

therefrom to be laid out in the payment or part payment of another for the support of my family.” He then directed that his two eldest sons should have the property when they came of age, after his wife’s death, if she should remain a widow, and if she should marry, they were to come into possession when of age, and that these two sons were to pay to the other children a proportion equal to their part of the property, adding, “all the above to be done to the wishes of the aforementioned executors.” None of the executors proved or acted, and in 1851 letters of administration, with the will annexed, were granted to the widow, who in the same year conveyed to defendant, describing herself in the deed as “sole devisee (with power of sale for purposes set forth) under the will of” &c. She married again about 1853. This sale she swore was made in order to pay the testator’s debts, and the purchase money so applied. *Held*, that the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the executors: that she did not take it as administratrix: that on her marriage her own interest was at an end; and that the sons could, therefore, eject defendant without any notice to quit or demand of possession. *Banting v. Gummerson*, 287.

2. *Construction—Period of vesting*—“Survivors.”]—Testator, after devising certain land to his son George and his wife, and to the survivor of them, added, “After the decease of the said George Jacob and his wife, I give, devise and bequeath the said lands (so devised to them) to the children of the said George Jacob and his wife, including Edmund Jacob, son of



the said George by his first wife, to have and to hold the same to the said children of the said George Jacob, or the survivors of them, for ever, share and share alike." George Jacob and his wife left two children surviving them. Edmund died before the father. In ejectment by one child against a purchaser from the other, *Held*, 1. That the remainder in fee vested upon the death of the last tenant for life, and that Edmund therefore took nothing. 2. That the two children took as tenants in common, and not as joint tenants, and that the plaintiff therefore was entitled only to one undivided moiety. *Keating v. Cassels*, 314.

3. *Construction — Description of land*—"North-west portion."—W. devised to his daughter T. six acres "off the north-west portion of lot twenty, in the third concession of Haldimand," to be chosen by his executors, and "to extend twenty rods in width joining the northern line of said lot twenty, and extending as far south as will comprise six acres aforesaid." One B. owned a strip of land at the north-west corner of the lot, extending twenty rods in width to the east, the whole lot being eighty rods wide; and this strip had for forty years been enclosed and occupied. The executors chose the six acres for T. adjoining this, and extending twenty rods east. Afterwards, on a survey made under C.S.U.C. ch. 93, sec. 11, the north-west angle of lot twenty was placed four rods further west; and defendants, who owned the remainder of lot twenty, then contended that T. must lose that width off the east side of her strip, as the devise restricted her to the "north-west portion" of the lot, and she

could not therefore come beyond the centre into the north-east part, although she could not otherwise get more than sixteen rods in width, B. having acquired a title by possession, so that his eastern fence could not be moved. *Held*, however, that the intention of the testator was to give six acres, twenty rods in width along the northern boundary of the lot, without reference to the strict meaning of the words "north-west portion:" that the executors had therefore chosen the land in accordance with the will; and that defendants, having trespassed thereon, were liable. *Tucker and Wife v. Phillips, et al.*, 626.

#### WITNESS.

*Tenant not admissible when landlord defends.*—See EJECTMENT.

*Compelling attendance of at arbitrations under The Railway Act.*—See RAILWAYS AND RAILWAY COMPANIES, 4.

*Addition of omitted in memorial —Registration held bad.*—See REGISTRY, 1.

See COSTS.—EVIDENCE.

#### WORDS (CONSTRUCTION OF).

"Convey."—See DOWER, 1.

"Proprietors."—See RAILWAYS AND RAILWAY COMPANIES, 6.

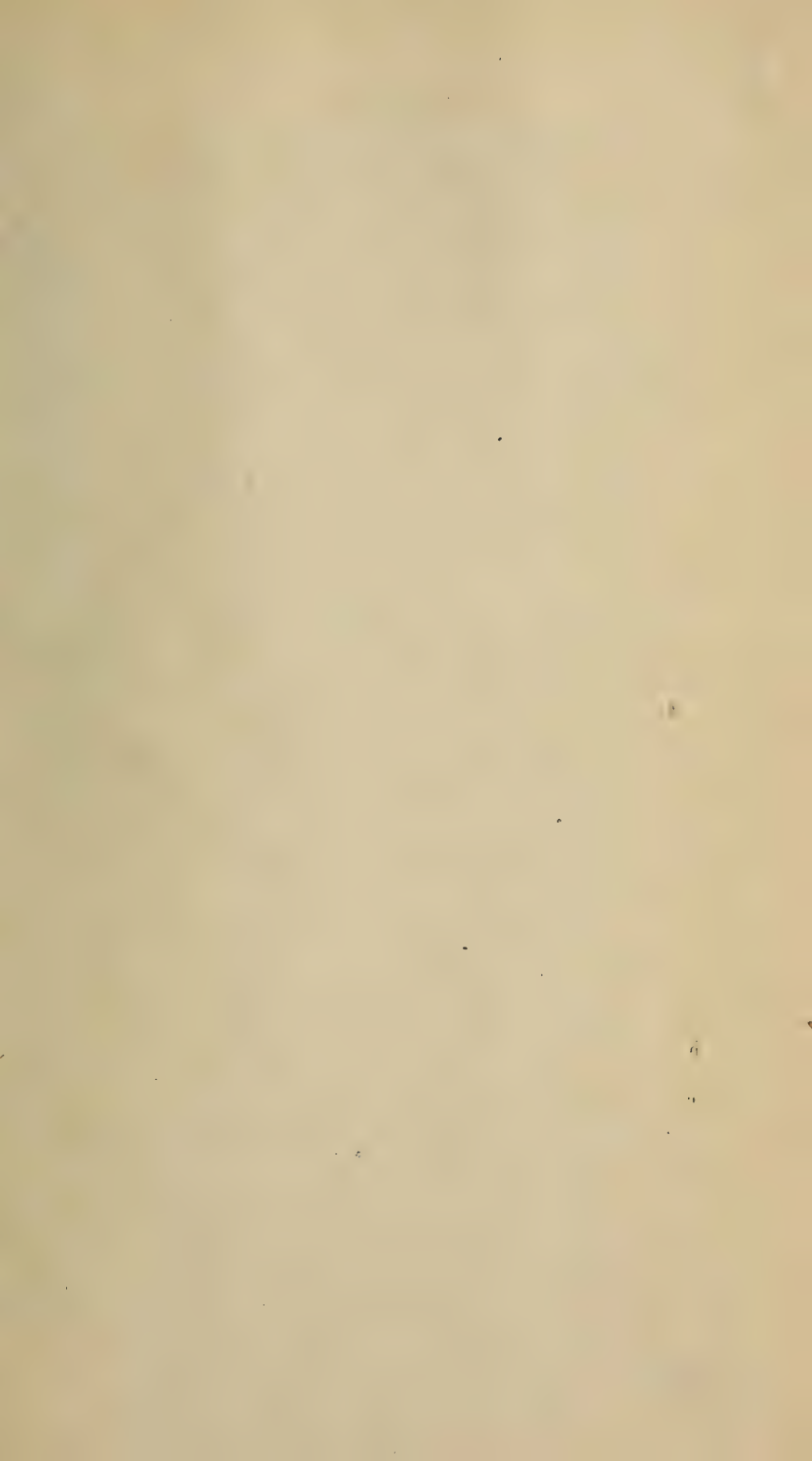
"Good for this day only."—See RAILWAYS AND RAILWAY COMPANIES, 7.

"Good for twenty days."—See RAILWAYS AND RAILWAY COS., 8.

"Survivors."—See WILL, 2.

"North-west portion."—See WILL, 3.

943 - 4 (25)











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